



OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2010-003

TO: John Engen, Mayor; Bruce Bender, Chief Administrative Officer;
Marty Rehbein, City Clerk; Nikki Rogers; Kelly Elam; City Council;

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE January 15, 2010

RE: Statutory, ordinance or city council rule provisions requiring a vote of approval by a majority of the city council membership requires that a majority of the actual existing city council membership must vote to approve the city council action for the vote to be successful.

FACTS:

There has been recent city council member and city clerk inquiry as to the meaning of a vote provision requiring a majority of the members of a city council to approve what is being voted on. Inquiry pertained to whether it means a majority of the entire membership or merely a majority of those city council members present. The current discussion pertained to city council Rule 33(G) which states in pertinent part "A majority of the council members elected is required to approve this type of appointment."

ISSUE:

What does a requirement that a majority of city council members vote to approve a city council action mean?

CONCLUSION:

A requirement that a majority of city council members vote to approve a city council action means, that a majority vote of the existing total city council membership is required in order to approve the city council action and not merely a majority vote of those city council members present and voting, unless the provision states "of those city council members present and voting".

LEGAL DISCUSSION:

Unless the language of a state law, city ordinance or city council rule states a majority vote of those city council members present and voting, such as exists in Montana state law §76-2-305 MCA pertaining to municipal zoning protests, a requirement for a majority vote of city council members means a majority vote of the existing total number of city council members holding city council office.

Section 76-2-305 MCA provides:

76-2-305. Alteration of zoning regulations -protest. (1) A regulation, restriction, and boundary may be amended, supplemented, changed, modified, or repealed. The provisions of 76-2-303 relative to public hearings and official notice apply equally to all changes or amendments.

(2) An amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city or town council or legislative body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of:

- (a) the area of the lots included in any proposed change; or
- (b) those lots 150 feet from a lot included in a proposed change. (Emphasis added.)

Section 7-4-4112 MCA pertaining to filling a vacancy in a municipal office requires a city council vote "by a majority of (city council) members" in order to successfully appoint a person to fill the vacant office.

7-4-4112. Filling of vacancy. (1) When a vacancy occurs in any elective office, this position is considered open and subject to nomination and election at the next general municipal election in the same manner as the election of any other person holding the same office, except the term of office is limited to the unexpired term of the person who originally created the vacancy. Pending an election and qualification, the council shall, by a majority vote of the members, appoint a person within 30 days of the vacancy to hold the office until a successor is elected and qualified.

(2) If all council positions become vacant at one time, the board of county commissioners shall appoint persons within 5 days to hold office as a city council member. The appointed city council member shall then appoint persons to any other vacant elective offices.

(3) A vacancy in the office of city council member must be filled from the ward in which the vacancy exists. (Emphasis added.)

Section 7-4-4112 MCA expressly requires a favorable vote of "a majority vote on the members," and not simply a majority vote of the city council members present. The Montana Supreme Court has stated that in the situation where there is an actually existing vacancy in the city council membership itself at the time the city council votes to fill the vacancy the required vote is a majority of those constituting the remaining actual membership at the time of the vote. See State ex rel. Wilson v. Willis, 133 P.962, 964 (1913), 1913 Mont. LEXIS 71.

Wilson v. Willis is a 1913 Butte city council case when there were eight (8) wards and sixteen (16) city council positions. One position was vacant as a result of a city council member's death. Further, one of the eight (8) majority vote of the remaining city council members when the vacancy for the deceased city council member vote occurred was being challenged, because he had recently been voted on to the city council to fill a resignation vacancy and he had only received eight (8) votes. The Montana Supreme Court held that eight (8) votes when there were only actually fifteen (15) actual city council members constituted "a majority of the members". The 1913 Montana Supreme Court stated:

No case called to our attention or revealed by our own researches, nor any analysis of the language independent of authority, suggests that the phrase "a majority of the members" could mean more than a majority of those constituting the actual membership of the body at the time; so that, if the full membership is sixteen but at a given time has been in fact reduced by the resignation of one, there are but fifteen members. (State ex rel. Attorney General v. Orr, 61 Ohio St. 384, 56 N.E. 14; People ex rel. Funk v. Wright, 30 Colo. 439, 71 P. 365; Board of Commrs. V. Wachovia Land & Trust Co., 143 N.C. 110, 118 Am. St. Rep. 791, 55 S.E. 442.) Hence, as long as there is a quorum present, a majority of fifteen, or eight, will elect to fill a vacancy. (Nalle v. City of Austin, 41 Tex. Civ. App. 423, 93 S.W. 141; People ex rel. Funk v. Wright, supra.) (Emphasis added.)

More specifically, with respect to appointment of city officers to an office, Montana municipal government statute §7-5-4121 MCA provides:

7-5-4121. Conduct of council business. (1) 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.

(2) The ayes and noes must be called and recorded on the final passage of any ordinance, bylaw, or resolution or the making of any contract. The voting on the election or appointment of any officer must be viva voce. A majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded. (Emphasis added.)

A majority of the whole number of city council members elected must vote for the election or appointment of a City officer in order for the election or appointment to be effective. Also see the following Montana Supreme Court decisions: State v. Swanberg, 299 P.2d 446 (1956); State v. Rogers, 93 Mont. 355, 18 P.2d 617 (1933); and State ex re. Peterson v. Peck, 91 Mont. 5, 4 P.2d 1086 (1931).

Another Montana statutory example of a majority vote of the city council being required is §7-4-4105 MCA providing:

7-4-4105. Authority to abolish appointive municipal offices. The city or town council may abolish, by a a majority vote of the council, any office, except that of city judge, the appointment to which is made by the mayor with the advice and consent of the council and may discharge any officer so appointed. (Emphasis added.)

Generally, references to a majority vote of the city council means a majority vote of the whole entire city council body membership unless the language specifically provides that it is a majority of those present and voting. City council rule 33(G) pertaining to city council appointments to various boards, agencies and commissions provides for "a majority of the council members elected is required to approve this type of appointment." This city council rule requires that at least seven of the twelve member city council must approve city council appointments made pursuant to city council rule 33(G).

CONCLUSION:

A requirement that a majority of city council members vote to approve a city council action means, that a majority vote of the existing total city council membership is required in order to approve the city council action and not merely a majority vote of those city council members present and voting, unless the provision states "of those city council members present and voting".

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Jim Nugent, City Attorney

JN:jlw