

# OFFICE OF THE CITY ATTORNEY

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435 Ryman • Missoula MT 59802  
(406) 552-6020 • Fax: (406) 327-2105  
[attorney@ci.missoula.mt.us](mailto:attorney@ci.missoula.mt.us)

## Legal Opinion 2011-019

**TO:** John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Brentt Ramharter, Finance Director; Dept. Municipal Court; Dept. City Clerk; Dept. Human Resources

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE:** October 11, 2011

**RE:** Laws applicable to City Council filling vacant municipal court judgeship

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### FACTS:

A vacancy in the Missoula Municipal Court judgeship is occurring.

### ISSUES:

- (1) Pursuant to state law what are the qualifications for a municipal court judgeship?
- (2) How is a vacancy in an elected municipal government office filled in Montana?
- (3) How soon must the city council fill a vacancy in an elective office?
- (4) How many city council members must vote in favor of an appointment to successfully fill a vacancy?
- (5) How long is the office held by the person appointed to fill a vacancy in an elective office?

### CONCLUSIONS:

- (1) Pursuant to state law a municipal court judge must be a citizen of the United States who has resided in the State of Montana two years immediately before taking office; be a resident of the county in which the court is located for one year; be admitted to the practice of law in Montana for at least three years prior to the date of appointment or election as judge; and be at least 18 years of age.

- (2) Pursuant to Mont. Code Ann. §§ 7-4-4112(1) and (3) as well as 7-5-4121(2), pending a city council election, the city council shall appoint, by a majority vote of its current membership, a person to hold the vacant office until a successor is elected and qualified.
- (3) Pursuant to Mont. Code Ann. § 7-4-4112 the city council shall within 30 days of the vacancy appoint someone to hold the office until an election of a qualified person occurs.
- (4) Since there are twelve city council members, at the time of the vote it will take seven city council member votes to successfully fill the position.
- (5) The office is held by the person appointed by the city council until a successor is elected and qualified at the next general municipal election.

### **LEGAL DISCUSSION:**

Montana municipal court laws are set forth in Title 3, chapter 6, Montana Code Annotated. Mont. Code Ann. § 3-6-202 establishes qualifications for a municipal court judge, providing:

**3-6-202. Qualifications -- certification -- training.** (1) A municipal court judge must have the same qualifications as a judge of a district court, as set forth in Article VII, section 9, of the Montana constitution, except that a municipal court judge need only be admitted to the practice of law in Montana for at least 3 years prior to the date of appointment or election.

(2) A municipal court judge shall reside in the county in which the court is located and shall meet the residency requirements provided in 3-10-204.

(3) The commission on courts of limited jurisdiction, upon finding compliance with subsections (1) and (2), shall issue a certificate, as required in 3-1-1502, prior to the municipal court judge assuming office. The certificate must be conditioned upon continued compliance with the minimum judicial education requirements provided for in this section. The certificate must be filed with the clerk and recorder as provided in 3-1-1502.

(4) A municipal court judge shall complete a minimum of 15 hours of continuing judicial education requirements each year or a greater number established by the supreme court. Attendance at the two annual training sessions under 3-10-203 may fulfill the requirement provided for in this subsection.

(5) Completion of a course approved for continuing judicial or legal education hours applies to the judicial education requirements under subsection (4).

(6) A municipal court judge is entitled to reimbursement by the city in which the judge holds or will hold court for all actual and necessary expenses and costs incurred in attending a continuing judicial or legal education course.

(7) On or before December 31 of each year, a municipal court judge shall file an affidavit of compliance with the continuing judicial education requirements established in this section with the commission on courts of limited jurisdiction.

The supreme court may sanction a municipal court judge or declare a vacancy in the office of the judge for failure to meet the training requirements established in this section. (Emphasis added.)

Mont. Code Ann. § 3-6-202 cross references § 3-10-204 with respect to residency requirements. Mont. Code Ann. § 3-10-204 provides for a one year county residency requirement:

**3-10-204. Residence requirements.** (1) A justice of the peace must reside in the county in which the justice's court is held.

(2) A person is not eligible for the office of justice of the peace unless the person is a citizen of the United States and has been a resident of the county in which the person is to serve for 1 year preceding election or appointment. (Emphasis added.)

Mont. Code Ann. § 3-6-202 also cross references to Article VII, § 9 of the Montana Constitution which provides:

**Section 9. Qualifications.** (1) A citizen of the United States who has resided in the state two years immediately before taking office is eligible to the office of supreme court justice or district court judge if admitted to the practice of law in Montana for at least five years prior to the date of appointment or election. Qualifications and methods of selection of judges of other courts shall be provided by law.

(2) No supreme court justice or district court judge shall solicit or receive compensation in any form whatever on account of his office, except salary and actual necessary travel expense.

(3) Except as otherwise provided in this constitution, no supreme court justice or district court judge shall practice law during his term of office, engage in any other employment for which salary or fee is paid, or hold office in a political party.

(4) Supreme court justices shall reside within the state. During his term of office, a district court judge shall reside in the district and a justice of the peace shall reside in the county in which he is elected or appointed. The residency requirement for every other judge must be provided by law. (Emphasis added.)

Any applicant for the vacant municipal court judgeship must be at least 18 years of age. Mont. Code Ann. § 2-16-102(2) provides “a person is not eligible to hold civil office in this state who at the time of election or appointment is not 18 years of age or older.”

Pursuant to Mont. Code Ann. § 7-1-114(1)(d), pertaining to *Mandatory provisions* of state law applicable to local governments, “[a] local government with self-government powers is subject to . . . all laws regulating the election of local officials.”

Mont. Code Ann. § 7-4-4112 provides:

**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.)

Article VIII, § 2 of the Missoula City Charter provides:

**2. Filling of vacancies.** (1) **When any vacancy occurs in any elective office**, unless otherwise provided for by state or federal law, this position shall be considered open and subject to nomination and election at the next general City election in the same manner as the election of any other person holding the same office, except the term of office shall be limited to the unexpired term of the person who originally created the vacancy. Pending such election and qualification the City Council shall, by a majority vote of the members, appoint a person within 30 days of the vacancy to hold the office until the successor is elected and qualified. (Emphasis added.)

Mont. Code Ann. § 7-5-4121 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.)

The Montana Supreme Court indicated in State ex. Rel. Wilson v. Willis, 47 M 548, 133 P 962 (1913), that the statutory requirement for a vote of "a majority of the members" of the city council to fill a municipal elected office means a majority of those constituting the actual membership of the body at the time the vote occurs. Therefore, seven of the twelve city council members must vote in favor of the municipal court judicial appointment to successfully fill the vacancy.

**CONCLUSIONS:**

- (1) Pursuant to state law a municipal court judge must be a citizen of the United States who has resided in the State of Montana two years immediately before taking office; be a resident of the county in which the court is located for one year; be admitted to the practice of law in Montana for at least three years prior to the date of appointment or election as judge; and be at least 18 years of age.
- (2) Pursuant to Mont. Code Ann. §§ 7-4-4112(1) and (3) as well as 7-5-4121(2), pending a city council election, the city council shall appoint, by a majority vote of its current membership, a person to hold the vacant office until a successor is elected and qualified.
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OFFICE OF THE CITY ATTORNEY

/s/

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Jim Nugent, City Attorney  
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