

Kenneth L. Weaver  
Editor

# Montana Municipal Officials Handbook

Third Edition

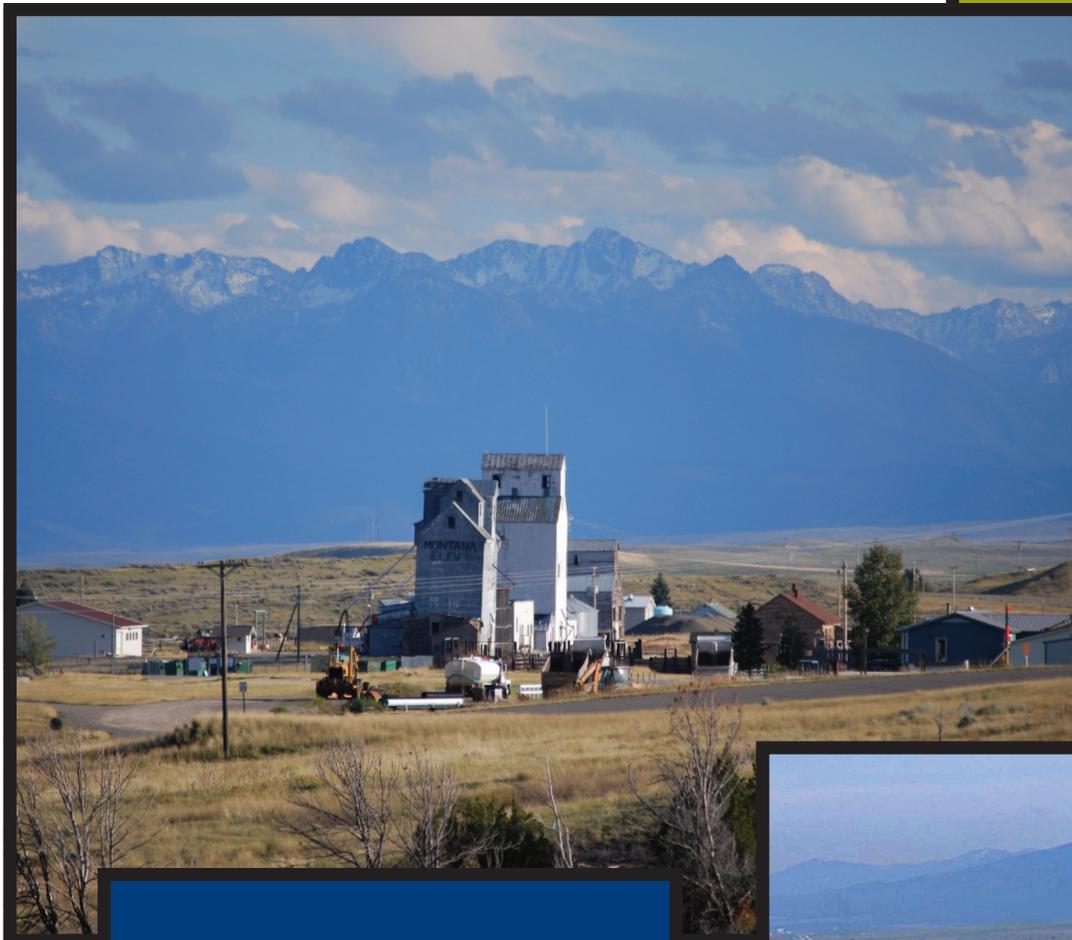


Local Government Center

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Third Edition

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**Thank You!**

## Preface

The creation of this handbook is a response to years of frustration experienced by newly elected mayors and council members and newly appointed municipal clerks who have had little in the way of accessible resource materials. The high turnover rate of these municipal officials' results in continuous erosion of the knowledge base and skills required to operate and maintain efficient, responsive and trusted municipal government in Montana.

The authors are experienced practitioners of Montana's municipal government as elected or appointed municipal officials or consulting experts who share an abiding commitment to the cause of good government in Montana's cities and towns. They view this handbook as a "work in progress" that simply had to get started even if our first efforts are imperfect. We will rely upon those who must meet the daily challenges of governing Montana's 129 cities and towns to help us improve, correct, update and enlarge what we hope will be a useful tool for municipal officials.

Prudent mayors, council members and municipal clerks all recognize the need for the assistance and legal counsel of an experienced city attorney and will understand that this handbook is not and cannot be a substitute for competent legal opinion. Rather, the handbook is intended to serve merely as an easily accessible first reference for local officials seeking an entry point into the resolution of common municipal issues. The statutory citations included herein are provided primarily for the convenience of the consulting city attorney who may be new to the local government venue and unfamiliar with the unusual organization of Title 7 of the Montana Code Annotated.

The authors are grateful to the MSU Local Government Center and to the Montana Municipal Interlocal Authority for the resources to undertake this project. We also wish especially to thank the Montana Municipal Clerks, Treasurers and Finance Officers Association for their unwavering support of the accomplishment of a useable handbook. However, errors and omissions are the responsibility of the authors, especially the editor, and should not be attributed to Montana State University, the Local Government Center or the Montana Municipal Interlocal Authority. We will welcome enthusiastically all criticism and corrections offered by the reader, which may be communicated directly to the Local Government Center at Montana State University, Bozeman, MT 59717.

*Kenneth L. Weaver, Editor*

***Dedication***

***Our work is dedicated to all those who serve in  
Montana's municipal government.***

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# CHAPTER I

## MUNICIPAL GOVERNMENT DEFINED

by  
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## 1.1 ORIGINS AND CHARACTERISTICS OF MUNICIPAL GOVERNMENT

### 1.101 The Origin of Governed Communities

Human history seems to validate Aristotle's ancient insight that man is, by nature, a social animal best suited for living in a community. Beginning about 6,000 years ago, at the dawn of the agricultural revolution, governed agricultural communities, emerged on the banks of the Tigris and Euphrates Rivers in Mesopotamia (modern day Iraq). Whether for the purpose of defense against hostile neighbors or as a means to gain the economic benefits of specialized labor and commerce (or both), the city emerged from its primitive, communal origins to become the defining institution of human civilization.

It is difficult to think of civilization at all except in the context of "the city." Improvements to the human condition made by the inhabitants who populated ancient Athens, Rome, Florence, and London or, for that matter, Tenochtitlan (Mexico City) or Mesa Verde, should remind us that it is within the city where human creativity flourishes. It is where wealth is accumulated and where individuals and their families seek safety in numbers.

Even though cities as governed communities existed thousands of years before the advent of the Roman Empire, it is in Roman law that the term "municipal" is first encountered. Cities by Roman law were called *municipia*. As such, Roman municipalities were governed, at least in theory, by local law and custom but the residents enjoyed the privileges of Roman citizenship and paid Roman taxes. The term "municipality" is derived from the Latin term *municipium* and today refers to a unit of general-purpose local government that, in Montana, is called either a "city" or a "town."

The founding of governed communities at Roanoke in 1585, Jamestown in 1607 and the Massachusetts Bay Colony in 1630 mark the origins of modern cities in the United States. As early as 1653, the community of New York was known as a "city." One might reasonably suppose that a definition of the term "city" and an accompanying body of municipal law might readily be traced back through these colonial origins to England and thence to the ancient civilizations. Surprisingly, that is not the case. Modern scholars of municipal law agree that, in the United States, the terms "city" or "municipality" never acquired a historically definite, technical meaning in law. As a consequence, *the terms municipality, city and town have developed meanings, which depend entirely upon how the terms are defined, employed or intended in a state constitution or in the laws adopted by state legislatures.* In short, the legal definition of these commonly used terms may well be different in Montana than in any one of our sister states. For example, Montana law creates only "cities" and "towns" as incorporated municipalities. *Unlike a number of other states, there are no incorporated "townships," "villages" or "boroughs" in Montana.*

**TABLE 1.1 Montana Municipalities  
With Probable Year of Incorporation**

*Based primarily upon Dale Harris, Handbook for Montana Municipal Officials, 1969 and Jerry R. Holloron, Local Government, Constitutional Convention Study No.16, 1971*

Municipality	Year	Municipality	Year	Municipality	Year
Alberton	1920	Fort Benton <sup>1</sup>	1883	Philipsburg	1890
Anaconda <sup>2</sup>	1888	Fort Peck	1986	Pinesdale	1984
Bainville	1929	Froid	1915	Plains	1907
Baker	1911	Fromberg	1902	Plentywood	1912
Bearcreek	1905	Geraldine	1905	Plevna	1916
Belgrade	1906	Glasgow	1902	Polson	1910
Belt	1907	Glendive	1902	Poplar	1909
Big Sandy	1915	Grass Range	1915	Red Lodge <sup>2</sup>	1892
Big Timber	1902	Great Falls <sup>2</sup>	1888	Rexford	1966
Billings <sup>1</sup>	1885	Hamilton <sup>2</sup>	1894	Richey	1949
Boulder	1911	Hardin	1911	Ronan	1912
Bozeman <sup>1</sup>	1883	Harlem	1910	Roundup	1909
Bridger	1907	Harlowton	1908	Ryegate	1917
Broadus	1946	Havre <sup>2</sup>	1890	Saco	1918
Broadview	1929	Helena <sup>1</sup>	1867	Scobey	1917
Butte <sup>1</sup>	1874	Hingham	1918	Shelby	1910
Cascade	1911	Hobson	1920	Sheridan <sup>2</sup>	1893
Chester	1910	Hot Spring	1929	Sidney	1911
Chinook	1901	Hysham	1916	Stanford	1911
Choteau	1913	Ismay	1916	St. Ignatius	1938
Circle	1929	Joliet	1906	Stevensville	1899
Clyde Park	1913	Jordan	1951	Sunburst	1923
Colstrip	1999	Judith Gap	1920	Superior	1948
Columbia Falls	1909	Kalispell <sup>2</sup>	1892	Terry	1910
Columbus	1907	Kevin	1926	Thompson Falls	1910
Conrad	1909	Laurel	1908	Three Forks	1910
Culbertson	1909	Lavina	1920	Townsend	1895
Cut Bank	1911	Lewistown	1901	Troy	1915
Darby	1916	Libby	1909	Twin Bridges	1902
Deer Lodge <sup>2</sup>	1889	Lima	1917	Valier	1909
Denton	1915	Livingston <sup>2</sup>	1889	Virginia City <sup>1</sup>	1864
Dillon <sup>1</sup>	1885	Lima	1927	Walkerville <sup>2</sup>	1890
Dodson	1920	Lodge Grass	1909	Westby	1916
Drummond	1945	Manhattan	1911	West Yellowstone	1966
Dutton	1935	Medicine Lake	1910	Whitefish	1905
East Helena	1927	Melstone	1913	Whitehall	1904
Ekalaka	1914	Miles City <sup>2</sup>	1887	White Sulphur Springs <sup>2</sup>	1888
Ennis	1956	Missoula <sup>1</sup>	1883	Wibaux	1911
Eureka	1907	Moore	1910	Winifred	1918
Fairfield	1940	Nashua	1918	Winnett	1916
Fairview	1914	Neihart <sup>2</sup>	1891	Wolf Point	1918
Flaxville	1955	Opheim	1928		
Forsyth	1905	Outlook	1916		

1. Incorporated individually by "special acts" of the Territorial Legislature. 2. Incorporated under the provisions of "An act relating to the formation of municipal corporations," Fifth Division, Section 440, March 10, 1887, Territorial Legislature. All others were incorporated by local election, by law.

## 1.102 Municipality Defined

Authoritative sources define the American municipality as having four essential characteristics, each of which is considered in detail in sub-section 1.103 immediately below. To exist as a municipality in the United States the entity must have:

1. Law making authority authorized by the state;
2. Legal personality such that it can sue and be sued and hold and dispose of property;
3. A local court that enforces local law;
4. A defined territorial area.

However, in Montana law, a municipality is defined simply as an entity that incorporates as a city or town [7-1-4121\(9\), MCA](#). Interestingly enough, this language sometimes causes confusion in as much as none of Montana's 127 presently incorporated municipalities can produce a document that even resembles the "articles of incorporation" that would usually define the purpose, structure and officers of a private corporation. In Montana, a city or town is brought into existence as a *public corporation* either directly by an act of the state legislature or indirectly pursuant to law enacted by the state legislature.

The first ten Montana communities to become *incorporated municipalities* were "incorporated" by an act of the Territorial Legislature during the period between 1864 (when Virginia City was incorporated) and 1885 (when Billings was incorporated). Later, communities that met the statutory criteria for incorporation and that wished to form a city or town government were brought into existence (i.e. became *incorporated municipalities*) by local elections that were conducted pursuant to the laws enacted by the Montana State Legislature. (See Table 1.1 for a list of incorporated municipalities in Montana and the probable year of incorporation.)

For example, the present municipal incorporation statute [7-2-4201, MCA](#) requires that a board of county commissioners order an election on the question of municipal incorporation when it receives a petition to do so containing the signatures of two-thirds of not less than 300 electors residing within an area of one square mile. If and when approved by the voters, municipal governing officials are then elected and the community becomes an *incorporated municipality* whose purpose, organization and governing powers are set forth in law. In short, *there are no municipal "articles of incorporation" in Montana.*

Here, it should be noted that 34 municipalities (including the two consolidated governments of Anaconda-Deer Lodge and Butte-Silver Bow) have adopted a self-government charter pursuant to state law and Article XI, Section 5 of Montana's 1972 Constitution. Even though these municipal charters define the powers, structure, privileges, rights and duties of the local government, consistent with state law, *the charter itself is not an instrument of municipal incorporation.*

Finally, in Montana law, there appears to be no significant distinction between the terms "municipality," "incorporated municipality," "city" and "incorporated city." Similarly, towns are, by definition, an "incorporated municipality," different than an "incorporated city" only because of its population based municipal classification. (See Section 1.2 for a discussion of Montana's municipal classification system.)

## 1.103 Disincorporation

Under Montana law [7-2-4901](#) and [4902, MCA](#) a *municipal corporation ceases to exist under either of two circumstances:*

1. If a city or town council fails to function for a period of two years, the municipality shall automatically be disincorporated.

2. A disincorporation petition signed by 15 percent of the municipal electors will require that the governing body place the question of disincorporation on the next general or primary election ballot. If 60 percent of the voters approve, the board of county commissioners will adopt an order declaring that the municipality is disincorporated. The assets of the former municipality pass to the county to be used to liquidate any residual obligations.

### 1.104 Characteristics of a Municipality

Among scholars of municipal government there is wide agreement that, in the United States, a municipality must possess the following essential characteristics:

1. ***The municipality and its law-making authority are authorized to exist by the state.*** The governing relationship between state and municipal government in America has a complex and convoluted legal history. Prior to about 1850, American municipalities enjoyed substantial autonomy and were generally free to exercise wide governing discretion with little interference from their respective state governments. After 1850, the balance of governing power began to shift substantially toward state government culminating, by the turn of the century in wide judicial acceptance of “Dillon’s Rule” that *local government is entirely the creature of the parent state and has no governing authority that has not been specifically or impliedly delegated by the state.*

Even before Montana became a state, “Dillon’s Rule” limited the governing powers of the Territory’s few counties and scattered municipalities. As early as 1887 the Supreme Court of the Montana Territory held that municipal corporations had no inherent right of local self-government. This holding was an entirely consistent application of the doctrine of the limited powers of a municipal government first set forth in 1872 by Iowa Judge John F. Dillon. In short, *Montana is a “Dillon’s Rule” state and, as such, all of Montana’s municipalities exist as a matter of state law and derive their governing and law-making authority either from the state constitution or from the laws adopted by the state legislature.* Even those cities which have, since adoption of the 1972 constitution, gained voter approved “self-government powers” *may not exercise any power prohibited by law or any power that requires delegation by Montana State Legislature.* (See Section 1.4 for a comprehensive discussion of self-government powers.) *In short, in Montana, a municipality is authorized to exist by the State of Montana and derives its governing powers from the State of Montana.*

Finally, it is important to remember that, for a wide variety of purposes, state law also defines a municipality simply as a “political subdivision” of the State of Montana, which means that, for some important purposes, local officials may be considered state officials or employees of the state. For example, the *Code of Ethics* (see [2-2-101, MCA](#)) prohibiting *conflict of interest* between public duty and the private interests of public officials also *applies to all local government officials and employees.*

2. ***The municipal entity has legal personality.*** Montana law [7-1-4101](#) and [7-1-4124, MCA](#) assigns “legal personality” to municipalities:

*A city or town is a body politic and corporate with the general powers of a corporation and the powers specified or necessarily implied in this title or in special laws heretofore enacted.*

As a public corporation, a municipality is, in turn, authorized by law [7-1-4124, MCA](#) to exercise general governing powers and, additionally, to exercise the usual powers of a corporation, such as the power to: sue and be sued; buy, sell and hold real or personal property; contract; borrow money and repay debt; and hire and discharge employees.

3. **There is a local court that enforces local law.** By law [3-1-101](#) and [3-11-101](#) or [3-6-101, MCA](#) and [7-4-4101 through 4103, MCA](#), every Montana municipality has a city or municipal court of limited jurisdiction, which is responsible for interpreting and enforcing local ordinances adopted by the governing body of the municipality and for certain civil proceedings involving the city or town.
4. **The municipality includes a defined territory.** Municipal governments in Montana and elsewhere in the United States are defined in terms of having determinate boundaries (city or town limits), which define and limit who may participate in the municipality's governing affairs and who comes within reach of its jurisdiction for most purposes.

Under certain limited and statutorily defined circumstances, a municipal government may be empowered by state law to exercise its jurisdiction beyond its own city or town limits. This so-called *extraterritorial authority varies significantly according to the functions or services for which the extraterritorial authority was granted by the legislature*. For example, the extraterritorial authority of a municipality to enforce health and quarantine ordinances extends (with approval of the county commission) five miles beyond city or town limits [7-4-4306, MCA](#) whereas the extraterritorial zoning authority of a Class I city is only three miles [76-2-310, MCA](#). *Prior to any attempt to exercise jurisdiction beyond city or town limits, prudent municipal officials will seek the advice of their city attorney.*

5. **Annexation.** Under rather stringent limitations, a municipality may also extend its jurisdiction and service delivery area beyond its existing city or town limits by *annexation of contiguous property* [Parts 42, 43, 46 and 47, Chapter 2, Title 7 MCA](#). Most typically, the annexation process is initiated by a petition signed by at least one-third of the registered electors of the area proposed to be annexed. Upon receipt of a properly executed petition, the governing body must call an election on the question in which the electors in both the municipality and in the area proposed for annexation are entitled to vote. However, if the petition includes the signatures of more than 50 percent of the registered electors owning real property in the area proposed for annexation or of the owners of 50 percent of the real property, which is often the case, the governing body may proceed with the annexation process without the need to call an election on the question. In general, municipal services must be extended to the annexed area according to a plan agreeable to the municipal government and the annexed property owners.

## 1.2 MUNICIPAL CLASSIFICATION

### 1.201 Purpose of Municipal Classification

Municipal classification is a system of categorization of municipalities based upon some shared attribute or circumstance, such as the size of the population or the value of taxable property within the local jurisdiction.

The primary purpose of assigning all of a state's *similarly situated* cities and towns to a particular class is to enable the state legislature to adopt *statewide* laws governing municipal operations while accommodating the distinctive characteristics and needs of the different classes of municipalities. For example, a statewide law requiring that every incorporated municipality have a fire department that must be organized and managed pursuant to state law [7-33-4101, MCA](#), specifically exempts *third-class cities and towns* by permitting any of these smaller municipalities to contract with rural volunteer departments or other local fire departments.

Presumably, there is, in this case, a *reasonable relationship* between the smaller population of a typical, Montana third-class city or town and the need for and affordability of a full-time paid fire department. Thus, a municipal classification system makes it possible for the legislature to write a single statute concerning some aspect of municipal governance, such as fire protection, while dealing in a practical and even-handed way with similarly situated

cities and towns.

A secondary purpose of establishing a system of municipal classification is to *restrain legislative interference* in the local affairs of an individual community. For example, Article V, Section 12 of the Montana State Constitution forbids the legislature from passing a special or local act when a general act is, or can be made, applicable. More than half of all state constitutions, as well as Montana’s earlier constitution, include some version of this constitutional barrier to direct legislative involvement in the affairs of a particular municipal government. Presumably, therefore, a hypothetical “local act” adopted by the state legislature requiring the City of Helena to appoint, rather than elect its city judge, would be struck down by the courts as an unconstitutional invasion of local authority under the *general law* [7-4-4101, MCA](#) which requires that first-class cities must elect their city judges.

### 1.202 Montana Municipal Classification System

The Montana system of municipal classification is set forth in law at [7-1-4111, MCA](#), which provides four different categories or classes of municipalities based solely upon population, as detailed in the following table.

**Table 1.2 Municipal Classification**

(July 2010)

Classification	Population	Number
<b>First Class</b>	10,000 or more	<b>7</b>
<b>Second Class</b>	5,000 to 9,999	<b>3</b>
<b>Third Class</b>	1,000 to 4, 999	<b>40</b>
<b>Town</b>	Less than 1,000	<b>75</b>
<b>TOTAL</b>		<b>125</b>

*Note: Does not include the two consolidated governments of Anaconda-Deer Lodge and Butte-Silver Bow.*

### 1.203 When and How to Change Classification

Unless a city or town undertakes its own direct enumeration of inhabitants, the basis for classifying Montana municipalities is the most recent federal decennial census. Whenever the federal census indicates that the population of a municipality has increased or decreased sufficiently to alter its classification, the city or town council must, by resolution, change the classification to conform to the classes established by [7-1-4111, MCA](#), as noted above. A certified copy of the resolution *must* be filed with the county clerk and recorder and with the Secretary of State. However, there are exceptions set forth at [7-1-4112, MCA](#).

**Exception # 1:** A city with a population of more than 5,000 but less than 7,500 may, by resolution of the city council, be a second-class city or a third-class city.

**Exception #2:** A city or town with a population of more than 1,000 but less than 2,500 may, by resolution of the city or town council, be a town or a third-class city.

The significance of these exceptions are:

- The elected and appointed municipal officers are somewhat different for each classification (See [7-4-4101 through 4103, MCA](#));
- The requirements for a municipal fire department are different for towns and third-class cities than for other classifications (See [7-33-4101, MCA](#));
- In a town or third-class city, the council may designate a justice of the peace or the city judge of

another city or town to act as city judge (See [3-11-205, MCA](#));

- If a city of the third class adopts a commission-manager form of government, it may continue to *appoint* its judge under an ordinance passed pursuant to [7-4-4102, MCA](#) and 45 A.G. Op. 15 (1993).

### 1.204 Principal Statutes Related to Municipal Classification

- [7-1-4111 through 4118, MCA](#)
- See also [7-4-4101 through 4103, MCA](#)
- [Article V, Section 12](#), Constitution of the State of Montana

## 1.3 FORMS OF MUNICIPAL GOVERNMENT

### 1.301 Forms of Government Defined

The 1972 Montana Constitution [Article XI, Section 3](#) requires the legislature to provide optional or alternative *forms of government* (emphasis added) that each unit or combination of units may adopt, amend or abandon by a majority of those voting on the question. In 1975, the legislature responded to this constitutional mandate by enacting [7-3-102, MCA](#), which requires that each unit of local government in Montana adopt one of the following forms of government:

- Town meeting form
- Commission form
- Commission-presiding officer form
- Commission-executive (council-mayor) form
- Commission-manager form
- Charter form

*The form of government refers to a particular structural arrangement of the law-making (legislative) and law-enforcing (executive) structures of the local government. For example, in the town meeting form of municipal government, the law-making (legislative function) is performed directly by the citizens convened in an annual or semi-annual town meeting. By comparison, the law-making function in the typical council-mayor form is carried out by the town or city council acting with the concurrence of an executive mayor possessing veto power. In the commission-manager form, on the other hand, law-making is solely the responsibility of the elected commission while the ordinances adopted by the commission are then carried out by the city employees under the supervision of a city manager.*

Even though there is significant variation in the structural arrangements within each form, the forms of government listed above are the forms of local government generally encountered throughout the United States. In Montana, however, *the commission form* is found only in county government (all but three of Montana's 56 counties use the commission form). All five of the other forms of government are found in one or more of Montana's municipalities, as detailed below.

### 1.302 Permitted Forms of Municipal Government

*The most obvious difference between each of the permitted forms of government is the method of selecting the chief-executive. However, the method of selecting a chief-executive will also significantly impact the governing relationship between the legislative branch of the local government (the commission or council) and the executive branch (the mayor, manager or presiding officer). The structural characteristics and the varying relationship between the legislative and executive branches of each of these forms of government are summarized in Table 1.3.*

**Table 1.3 Forms of Municipal Government in Montana**

Form of Government	With	Without Charter	Totals
Town Meeting	1		1
Commission-Presiding Officer		2	2
Commission Executive (Council-Mayor)	23*	89	112*
Commission-Manager	9	3	12
Totals	<b>33</b>	<b>94</b>	<b>127</b>

\* includes the two consolidated governments

### Town Meeting Form

There is but one example of the town meeting form of municipal government in Montana and that is found in the small community of Pinesdale. This is a form of government authorized by Montana law for only those communities of less than 2,000 residents. It has two distinguishing characteristics. First and most characteristically, it is a form of local government based upon *direct democracy* rather than *representative democracy*, which means that there is no elected council to represent the interests of the community. Rather, the citizens (electors) represent themselves in at least one annual town meeting to make policy decisions, which are to be carried out by an elected *town presiding officer* who is provided with specifically-limited administrative powers sufficient to enable the day-to-day operations of the government. Second and less obviously, the success of this form of government ultimately depends upon the willingness of the community to participate in its own governance through direct and knowledgeable involvement in the annual policy-making meeting.

Whatever advantages the town meeting form may offer a small, relatively homogeneous, community by way of open, participatory, minimalist and inexpensive government, this form of municipal government may also be disadvantaged by a cumbersome decision-making process. In a community facing complex policy issues, such as land-use planning and zoning, and which also has a diversity of neighborhood interests, the more robust decision processes of representative government would probably be required to cope effectively with the modern challenges to municipal government.

### Commission Form

Although permitted by state law and still functioning in a few states, there is no example of the commission form of *municipal* government in Montana. Rather, it is the most frequently encountered form of *county* government with some 53 of Montana’s 56 counties using the elected commission form of government.

### Commission-Presiding Officer Form

The commission-presiding officer form of government has been adopted only by Broadview and Virginia City and both in 1976 during the first cycle of Montana’s unique Voter Review process. This somewhat unfamiliar form of local government is included as one of the optional forms specifically permitted by Montana law although it is seldom encountered in the United States. It is, in essence, a “parliamentary” form of government in that the elected commission or council of not less than five members *selects a presiding officer from among its own members* to serve as the chief-executive for a term determined by the commission. The presiding officer, who may be called the president or mayor, also retains full voting rights as a member of the commission and is the presiding officer of the commission. Hence, this form fuses legislative responsibilities with substantial executive authority (but not veto power) in a single individual, not unlike a British or Canadian prime minister.

The commission-presiding officer form of municipal government has at least two advantages, which some critics would also recognize as potential liabilities. The most probable advantage of this form, especially in a relatively small community where the pool of willing and competent candidates to serve in municipal government is likely to be quite

limited, is that the chief-executive is recruited directly from those already elected to serve on the municipal council. The elected council becomes the training and selection mechanism for the chief-executive in this form of municipal government. A critic might point out that the apparent advantage of indirect selection of the community's chief-executive officer by the council deprives the electorate of the opportunity to vote for a chief-executive of their choice, thereby reducing electoral accountability.

A second advantage that might be advanced in support of the commission-presiding officer form is that by enabling a majority of the commission to choose the executive, it is likely that the individual will share, in some degree, the political orientation and policy priorities of a majority of the commission. As a result, the community might expect decisive collaborative leadership from its municipal government. On the other hand, a critic might reason that, because the chief-executive serves at the pleasure of the commission, which could reverse its appointment at will, this form of government could be inherently unstable with unpredictable changes in executive leadership accompanied by episodes of unsettling policy reversals.

### **Commission-Executive (Council-Mayor) Form**

By far the most commonly encountered form of municipal government in Montana is the commission-executive form, usually called the "council-mayor" or "aldermanic" form of municipal government. It is characterized by a locally elected city or town council (alternatively referred to as commission in [7-3-201, MCA](#) and a separately elected executive mayor. With separate elections for and partial separation of the legislative and executive branches, the council-mayor model is the form of local government which most nearly approximates the structures of our familiar national and state models of government. In addition to the 112 Montana cities and towns using this form, the charters of the consolidated city-county governments of Butte-Silver Bow and Anaconda-Deer Lodge also call for a commission-executive form of government.

Most of the cities and towns which use the council-mayor form have never gained voter approval of its adoption by popular initiative or through the Voter Review process. As a consequence, the structures and powers of 90 of these municipalities operating with the statutory version of the council-mayor municipal government are spelled out in state law, as detailed immediately below.

**The Commission.** The statutorily defined version of the council-mayor form provides for a governing and policy-making body (the council) of not less than three members elected to overlapping, four-year terms of office. Council members are required to be elected on a partisan basis by districts (wards) in which they must reside and which must be apportioned by population. In historic terms, this is essentially an "aldermanic" system in which the governing body or commission is comprised of elected members who might be expected to represent both their neighborhoods and their political parties. However, most Montana communities using this statutory form of government simply ignore the requirement for partisan elections or have adopted a local ordinance calling for nonpartisan elections while retaining all other features of this form as required by law. Typically, each ward elects two members to the city council, one of whom is elected every two years thereby establishing the four-year, overlapping terms of office required by law.

**The Executive.** The elected mayor is the chief-executive in the commission-executive form of municipal government. The mayor is elected at large in the community, typically as a nonpartisan candidate irrespective of the statutory requirement that he or she be elected on a partisan basis. The statutory term of office as mayor in this form is four years with no limit placed by law on the number of consecutive terms of office.

The nature and extent of the mayor's executive powers and duties are set forth rather specifically by law [7-3-203, MCA](#). In this statutory form, the mayor as chief-executive is obliged and empowered to enforce state law and local ordinances and has the responsibility of carrying out and administering the policies and resolutions adopted by the council.

Additionally, and unlike the national and state models of government, the mayor serves as the presiding officer of the city or town council and may take part in council discussions but may cast a vote only to break tie votes of the council. The mayor does, however, enjoy *veto power with respect to the ordinances and resolutions adopted by the council. However, an executive veto is subject to a two-thirds override vote by the council.*

The procedurally powerful role of the mayor in serving as the presiding officer of the council is a particularly significant characteristic of this statutorily defined version of the council-mayor form of government. The resulting overlap in executive and legislative functions virtually mandates a cooperative relationship between the mayor and at least a majority of the council if the legislative and policy-making process is to function smoothly. This same pattern of shared responsibilities is extended in a reciprocal way to the administration of the day-to-day affairs of the local government. For example, the mayor's appointments to fill department head positions within the government, as well as vacancies on the various city boards, require the consent expressed in a majority vote of the council. Similarly, the preparation of the annual budget for council consideration and final adoption is also a shared council-mayor responsibility. Finally, though the mayor may exercise broad administrative control and supervision of all city departments and boards, he or she may do so only to the degree authorized by local ordinance adopted by the council.

In summary, the commission-executive (council-mayor) form of municipal government is the most frequently encountered and therefore the most familiar form of local government. In Montana, 112 cities and towns, including the two consolidated units of city-county government, employ some version of this traditional council-mayor form. The separately elected mayor and city or town council typically share general government powers. Nonpartisan and districted (ward-based) elections incline this form of government toward a fairly high degree of political responsiveness in meeting ward and community expectations. However, the shared nature of the executive powers exercised by the mayor, with substantial council involvement, requires a cooperative relationship between the two branches of municipal government which, when absent, limits its capacity for management efficiency.

### **Commission-Manager Form**

Some in Montana might view the commission-manager form as an untried, if not radical, departure from the familiar council-mayor form. In fact, however, the commission-manager form of local government has been in continual and growing use in the United States since the turn of the century and in Montana since 1921 when Bozeman was the first city to adopt this form, apparently in an effort to strengthen its capacity to deal with its then serious financial difficulties. Presently in the United States there are more than 3,600 commission-manager cities. In Montana, 12 municipalities have adopted this form and typically for the same reasons Bozeman did, which was to increase the efficiency of their city government.

Of the 12 commission-manager forms of municipal government now functioning in Montana, nine are embedded within voter approved, self-governing charters. The remaining three communities adopted, with minor variations, the statutory version of the commission-manager form whose structures and powers are set forth specifically in law and described immediately below.

**The Commission.** The role of the city commission in the commission-manager form of government is quite different from that of the traditional city council. Gone are the shared executive powers and day-to-day committee involvement in the administration of city affairs. Gone too are the aldermen representing their neighborhoods, wards, and political parties. In this form of local government, the commission typically has five members elected at large from the community and without political party identification. The commission's much simplified yet more *sophisticated role is to set goals, make policy and then hire a*

*competent and compatible manager to achieve its goals and carry out commission policy.*

Even the role of the presiding officer of the commission carries with it no executive or administrative authority. Although the commission chairperson is often and ambiguously referred to as the “mayor,” she or he has no authority beyond that of presiding over the city commission itself and in doing so may not exercise veto power. The presiding officer of the commission is sometimes selected by the commission from among its own number; however, most manager cities in Montana now directly elect a mayor to serve as the presiding officer of the city commission. In most cases, the chair of the city commission (mayor) may be recognized as the “head of the municipality” for limited ceremonial purposes.

**The Executive (Manager).** The distinctive characteristic of the commission-manager form is that the executive (manager) is hired by and serves at the pleasure of the commission, rather than being elected directly by the voters. Once appointed to the position, the manager is responsible to the commission for the administration of all departments and services of the city. Unlike the shared and blurred executive powers of the mayor in the commission-executive form, described above, the typical Montana city manager has sole responsibility to enforce the law, direct, supervise, hire and fire all employees of the city (except those who may work directly for the commission, such as clerk of the commission) and to prepare the city’s budget for commission approval. Neither the commission nor any individual commissioner may give orders to or even deal with the city employees except through the manager. As in the modern corporation, the commission serves as the “board of directors” and the city manager is the municipal government’s “CEO.”

In summary, the commission-manager form of government is characterized by relatively simple organizational structure, clearly defined responsibilities and powers of the hired professional manager and by the sharply defined policy-making role of the elected commission. A reasonable expectation of this form of government is that the full-time professional manager, directly accountable to an elected commission, will bring a measure of competent efficiency to local governmental operations. In some communities these efficiencies may become imperative in order to cope with the difficult financial conditions and growth problems confronting Montana’s medium size and larger communities in the new century. The aggregate experience of the Montana communities, which have successfully adopted this form of government, tends to bear out this expectation although it would be incorrect to assume that the manager form will produce less expensive government.

### **Charter Form**

Montana law [7-3-102, MCA](#) specifies the “charter form” as one of the enumerated and permitted forms of local government. However, in reality those 33 municipal governments in Montana which have adopted a self-government charter have essentially wrapped a charter around the governing structures described in one of the forms of government described above. For example, both the Billings charter and the Belgrade charter provide for governing structures that are typical of the commission-manager form while the voters of Red Lodge and Troy wrapped a self-government charter around the familiar structures of the council-mayor form of municipal government. Technically, however, these and all of the other municipalities which have adopted self-government charters now operate with the “charter form” of municipal government. (See Table 1.3 for a list of municipalities with charter governments.)

**Charter Requirements:** [Part 7, Chapter 3, Title 7, MCA](#) implements [Article XI, Section 5](#) of the Montana constitution by providing procedures for constructing a local government charter.

In essence, a municipal charter is a voter approved written constitution that defines the powers, structures, privileges, rights and duties of the local government. A charter may also impose limitations on the local government such as property tax mill levy limits and may specifically authorize the local government to perform functions or services not otherwise delegated to “general powers” municipalities. In general, a locally devised self-government charter must:

- Provide for a legislative body and, if other than the town meeting form, the method of election of the members;
- Designate which official will serve as the government's chief-executive and chief administrative officer and the method of selection, the powers and duties and the grounds for removal from office; and
- Provide for an effective date.

Additionally, the charter may establish other legislative, administrative or organization structures and these provisions are superior to statutory provisions. On the other hand, a charter may not include provisions which conflict with limitations on self-government powers imposed by law or which establish election, initiative or referendum procedures, nor may the charter contain any provisions establishing or modifying the local court system.

### 1.303 Method to Alter the Form of Municipal Government

Under Montana law, there are three methods of altering the form of a local government and *all three methods of alteration require voter approval*:

1. By the Local Government Review process [7-3-171 through 7-3-193, MCA](#) and [Article XI, Section 9](#), Montana State Constitution
2. By citizen petition (initiative) process [7-3-103](#) and [7-3-125, MCA](#)
3. By a council/commission referendum process [7-3-103\(2\), MCA](#)

#### Alteration by Local Government Review

This method of altering local government forms and powers (often referred to as the Voter Review process) is unique in the United States. In essence, Montana's 1972 Constitution requires that every 10 years starting in 1974, the governments in every municipal and county jurisdiction **must** ask their voters whether they wish to elect a panel of citizens to conduct a two-year review of the forms, powers, functions and services of their unit of local government and to make recommendations directly to the voters concerning alterations in the form of government.

Pursuant to [7-3-173, MCA](#) the city/town must pass a resolution that calls for an election on the question of conducting a local government review and establishing a study commission. This resolution must be passed and submitted to the County Elections Administrator by a date determined by the Secretary of State's office and the question will subsequently appear on the ballot at the primary election. The ballot language is mandated by [7-3-175, MCA](#) and includes both the number of members to be elected to the study commission and the dollar amount or number of mills that will be permissively levied to fund the activities of the study commission. See the Sample Resolution on the following page.

The purpose of a study commission is to "*study the existing form and powers of a local government and procedures for delivery of local government services and compare them with other forms available under the laws of the state*" [7-3-172, MCA](#). The Study Commission's powers are enumerated at [7-3-183, MCA](#) and include the authority to employ and fix the compensation of necessary staff, contract and cooperate with other agencies, establish advisory boards and committees, retain consultants, and do any other act consistent with and reasonably required to perform its functions. A study commission examining the government of a municipality may recommend amendments to the existing plan of government, recommend any plan of government authorized by Title 7, Chapter 3, parts 1 through 6, draft a charter (or recommendations on amendments to the charter), recommend municipal-county consolidation, recommend disincorporation; or submit no recommendation [7-3-185\(2\)\(a\), MCA](#). In addition, a study commission may

recommend service consolidation or transfer in cooperation with a county study commission, a county study commission and one or more municipal study commissions, or one or more municipal study commissions [7-3-185\(2\)\(b\), MCA](#).

A study commission must prepare a budget for each fiscal year it is in existence and submit it to the city/town commission for adoption. The city/town commission must, for the support of the study commission, appropriate an amount necessary to fund the study [7-3-184, MCA](#). To do so, the city/town commission *“may levy mills in excess of all other mill levies authorized by law to fund the appropriation”* [7-3-184\(2\)\(a\), MCA](#). Any money remaining in the study commission fund at the end of the two-year cycle reverts to the municipality’s general fund.

Since its implementation in 1974, five cycles of the Voter Review process have now been conducted, resulting in 202 proposed changes to municipal government, of which 74 proposals for change have been approved by municipal voters.

RESOLUTION NUMBER 20XX---\_\_\_\_\_

A RESOLUTION OF THE CITY/TOWN COUNCIL OF THE CITY/TOWN OF \_\_\_\_\_, MONTANA, CALLING FOR AN ELECTION ON THE QUESTION OF CONDUCTING A LOCAL GOVERNMENT REVIEW AND ESTABLISHING A STUDY COMMISSION TO DO SO.

WHEREAS, Section 9, Article XI of the Constitution of the State of Montana requires that each unit of local government shall conduct an election once every ten years to determine whether the local government will undertake a local government review procedure; and

WHEREAS, 7---3---173(2) M.C.A. requires that the governing body shall call for an election, to be held on the primary election date, on the question of conducting a local government review and establishing a study commission; and

WHEREAS, the \_\_\_\_\_ City/Town Council is the governing body of the City/Town of \_\_\_\_\_.

NOW THEREFORE BE IT RESOLVED THAT:

1. The City/Town Council of \_\_\_\_\_ hereby calls for an election on the question of conducting a local government review and electing a study commission to be held at the primary election on June 3, 20XX.
2. If the voters decide in favor of conducting a local government review, a study commission comprised of three members (or other odd number of members greater than 3) shall be elected at the general election of November 4, 20XX.
3. Pursuant to 7---3---175, M.C.A. the question of conducting a local government review shall be submitted to the electors in substantially the following form:

Vote for one:

FOR the review of the government of (insert name of local government) and the establishment and funding, not to exceed (insert dollar or mill amount), of a local government study commission consisting of (insert number of members) members to examine the government of (insert name of local government) and submit recommendations on the government.

AGAINST the review of the government of (insert name of local government) and the establishment and funding, not to exceed (insert dollar or mill amount), of a local government study commission consisting of (insert number of members) members to examine the government of (insert name of local government) and submit recommendations on the government.

Passed and adopted by the City/Town Council of the City/Town of \_\_\_\_\_, Montana meeting at regular session held on the \_\_\_\_\_ day of \_\_\_\_\_, 20XX.

\_\_\_\_\_  
, Mayor/Presiding Officer

ATTEST:, City/Town Clerk

### **Alteration by Citizen Petition (Popular Initiative)**

The authority and process for altering municipal government form, structures and powers by popular initiative are set forth at [7-3-125 through 161, MCA](#), which require that the petition be signed by at least 15 percent of the electors registered at the most recent municipal election. Upon receipt of an authenticated citizen initiative, the municipal government is obliged to call an election on the proposed alteration.

### **Alteration by Commission/Council Referendum**

A unit of municipal government which has previously adopted an alternative form of government or which has previously adopted a self-government charter may, by ordinance, *refer to the local voters* a proposed amendment to the existing form of government or an amendment to the self-government charter.

It should be noted that at the November 1976 election following the first round of Voter Review, *all* Montana municipalities were required to vote for one of the *alternative forms of government* enumerated at [7-3-102, MCA](#). Importantly, the required ballot language had to specify a vote *FOR* the adoption of a proposed form of government or *FOR* the existing form of government [7-3-150, MCA](#). Either outcome resulted in an affirmative vote for the adoption of one of the *alternative forms of government listed at 7-3-102, MCA*, thereby satisfying the enabling condition for referral of a proposed amendment by the council, as required by [7-3-103\(2\), MCA](#).

### **1.304 Principal Statutes Related to Forms of Municipal Government**

1. [7-3-102](#) and [103, MCA](#)
2. [7-3-111](#) through [114, MCA](#) and, by reference, [7-3-201](#) through [709, MCA](#)
3. [Article XI, section 3](#), Constitution of the State of Montana.

## **1.4 POWERS OF MUNICIPAL GOVERNMENT**

### **1.401 Governing Powers Defined**

A municipality's governing power is its authority to act in order to carry out the lawful functions of a municipal government. In Montana, a municipality's authority to exercise governing power is derived from: (1) the state constitution; (2) enabling legislation; (3) a voter approved self-government charter; and (4) the interpretation of these sources of authority by the courts and by the opinions of the state's attorney general.

### **1.402 Municipal Police Powers**

In the most general sense, the police power is the power to legislate for the public health, order, safety, morals and welfare. A municipality's police powers are typically employed by the governing body (city or town commission or council) to enact and enforce local ordinances and regulations requiring that those who are subject to the city or town's jurisdiction conduct themselves and use their property so as not to unnecessarily injure others.

Police power is not an inherent power of a Montana municipal government. Rather, it has been delegated by the state whose own police power derives as a "reserved power" directly from the Tenth Amendment of the U.S. Constitution. In Montana, the delegation of police power to all municipal governments is encoded generally at [7-1-4123](#) and [7-5-4101, MCA](#).

A prudent governing body will exercise caution and seek the advice of the city attorney before employing its police powers to:

- License some commercial activity;
- Define and/or abate some community or neighborhood nuisance; or
- Regulate the use of private property.

In doing so, the municipal government will necessarily interfere in some way with the liberty of action of the people or with the free and unencumbered use of their private property. Legal scholars point out that there must first be a showing that there is a *public interest* that requires governmental interference with a person's freedom or property rights. Secondly, the means adopted by the government to advance that public interest must be *reasonably necessary* to accomplish that purpose. Moreover, and especially with respect to the exercise of municipal police power to license commercial activity, it is important to note that:

*There is a well understood distinction between a license fee imposed under the police powers for the purpose of regulation and a tax imposed under the taxing power for revenue. A license fee or tax under the police power is such a fee only as will legitimately assist in regulation and will not exceed the necessary and probable expense of issuing a license and inspecting and regulating the business.<sup>1</sup>*

In short, the legitimate purpose of using police power to license pursuant to [7-21-4101, MCA](#) is to protect the public health, safety and well-being, *not to raise revenues*.

Finally, a municipality's power, under state law, to place restraints upon the personal freedom and property rights of individuals for the protection of the public health, safety and well-being, is always subject to the limitations imposed by the Montana State Constitution and the U.S. Constitution.

Especially important in the exercise of police power is careful observance of constitutionally protected *due process* requirements. Accordingly, a prudent municipal council or commission will *always seek the advice of the city attorney before trying to exercise its government's police powers*.

### 1.403 General Government Powers

[Article XI, section 4](#) of the 1972 constitution provides that municipalities with *general powers*, (i.e. all of those municipalities that lack *self-government powers*) have the powers of a municipal corporation and other powers provided or implied by law, which is to say only those powers delegated to municipalities by the state legislature.

Montana law [7-1-4123](#) and [4124, MCA](#) specifies the governing powers that may be exercised by a municipal government with *general powers* and which enable any municipal government to protect the public health, safety and welfare within their community. The statutes also provide that a *general powers* municipality may perform any function or provide any service *authorized or required by state law* and may exercise any power *authorized by state law*. The effect of this language is *to limit the governing powers of a general powers municipal government to those powers explicitly delegated to it by the state legislature or necessarily implied incident to such delegation*.

This limitation on the exercise of local governing powers is often cited as "Dillon's Rule," which is derived from the 1872 writings of Iowa Judge John F. Dillon, whose narrow construction of local governing powers has been widely adopted by state and federal courts. In short, a *general powers municipal government* in Montana may exercise only those governing powers made available to the municipal government by the state legislature or reasonably implied or necessary to implement a legislatively delegated power. *If the state legislature has not delegated the power to provide a service or perform a governmental function, a municipal government with general powers is*

*not authorized to do so.*

### **1.404 Self-Government Powers**

[Article XI, Section 6](#), of the 1972 constitution provides that a local government, which adopts a self-government charter may exercise any power not prohibited by this constitution, law or charter.

At first reading by a municipal official, this sweeping constitutional grant of *any power not prohibited* to a self-governing municipality would appear to reverse “Dillon’s Rule” and with it the municipality’s dependence upon a specific legislative grant of governing authority to perform some function or exercise some power. Such an interpretation would be perilous. The governing reality is that the Montana State Legislature has found it appropriate to *prohibit* the exercise of a very broad range of governing powers, even by a self-governing municipality. *In general, these legislatively imposed prohibitions are set forth explicitly in law at [7-1-111](#) through [7-1-114, MCA](#), which, in aggregate, significantly diminish the substance of local self-governing authority.*

Notwithstanding the prohibitions noted above, possession of self-government powers may well enable a municipality to act in the best interests of its citizens under circumstances where a *general powers* government would not be able to act. For example and because they possess self-government powers, Billings was enabled to expand its solid waste service area; Great Falls gained greater authority to dispose of public lands; Helena and Billings were able to implement local development fees; Anaconda-Deer Lodge altered its organizational structure; Libby and Troy were enabled to develop and operate an electric utility; and the Attorney General recently decided that Butte-Silver Bow’s self-government powers enabled it to acquire and operate electric and natural gas utilities within and outside the boundaries of its jurisdiction.

The availability of self-government powers to a municipal government will not, in and of itself, solve community problems or improve local government performance. At best, self-government powers will enable a community and its local government to become more effective participants in their own problem-solving and governing processes.

### **1.405 Acquiring Self-Government Powers**

*A municipal government may acquire self-government powers only with the approval of a majority of the municipal electors voting on the question.* The question may be presented to the local electorate directly as a ballot proposal to adopt self-government powers, or indirectly as a ballot proposal to adopt a municipal charter, which, if approved by the voters, automatically confers self-government powers upon the municipality. See Section 1.303 above for the specific requirements to alter or amend the plan of government.

**Table 1.4 Municipalities with Self-Government Powers**

GOVERNMENT	FORM	WITH CHARTER	WITHOUT CHARTER
Anaconda-Deer Lodge*	Consolidated Com-Ex	X	
Butte-Silver Bow*	Consolidated Com-Ex	X	
Belgrade	Com-Manager	X	
Billings	Com-Manager	X	
Bozeman	Com-Manager	X	
Bridger	Com-Ex	X	
Broadview	Com-Ex		X
Choteau	Com-Ex	X	
Circle	Com-Ex	X	
Clyde Park	Com-Ex		X
Colstrip	Com-Ex	X	
Conrad	Com-Ex	X	
Cut Bank	Com-Ex	X	
Darby	Com-Ex	X	
Dillon	Com-Ex	X	
Ennis	Com-Ex	X	
Forsyth	Com-Ex	X	
Fort Benton	Com-Ex		X
Fort Peck	Com-Ex		X
Fromberg	Com-Ex		X
Glasgow	Com-Ex		X
Great Falls	Com-Manager	X	
Helena	Com-Manager	X	
Hingham	Com-Ex		X
Laurel	Com-Ex	X	
Lewistown	Com-Manager	X	
Libby	Com-Ex	X	
Lima	Com-Ex	X	
Manhattan	Com-Ex	X	
Missoula	Com-Ex	X	
Neihart	Com-Ex		X
Pinesdale	Town Meeting	X	
Polson	Com-Manager	X	
Red Lodge	Com-Ex	X	
Saco	Com-Ex	X	
Sunburst	Com-Ex	X	
Superior	Com-Ex	X	
Three Forks	Com-Ex	X	
Troy	Com-Ex	X	
Virginia City	Com-Presiding Officer		X
West Yellowstone	Com-Manager	X	
Whitefish	Com-Manager	X	
Wolf Point	Com-Ex		X
<b>TOTALS</b>		<b>33*</b>	<b>10</b>

\* includes the two consolidated governments

## 1.406 Principal Statutes Related to Municipal Governing Powers

1. [7-1-111](#) through [114, MCA](#)
2. [7-1-4101, MCA](#)
3. [7-1-4122](#) through [4124, MCA](#)
3. [Article XI, sections 4, 5 and 6](#), Constitution of the State of Montana

## 1.5 MUNICIPAL OFFICERS

### 1.501 Definition of Officers

In Montana, municipal officers are generally defined as “. . . a person holding a position with a municipality that is ordinarily filled by election. . .” [7-1-4121\(11\), MCA](#). However, some sections of state law refer to both the elected as well as the “appointed officers” of municipal government. For example, [7-1-4137, MCA](#) requires that “Every elected and appointed municipal officer shall take the oath of office...” Also, the elected and appointed officers to be included in city and town governments are specifically designated at [7-4-4101](#) through [7-4-4103 MCA](#) and *include the elected mayor, council members and city judge as well as the appointed city clerk or clerk-treasurer, the city attorney and the chief of police.*

A municipal employee who fills a department head position is not included as a designated municipal officer and is not required by law to take an oath of office nor does the incumbent require periodic reappointment.

The distinction between an officer of municipal government and a municipal employee can be very important. For example, the term of office of an elected officer (the mayor and members of the city or town council) simply expire as a matter of law or city charter. Municipal employees, upon completion of a period of probationary employment, are protected by the “wrongful discharge from employment” statutes, [39-2-904, MCA](#). *The appointed officers (city/town clerk and chief of police) are also employees whose employment rights are protected by law.*

### 1.502 Required Qualifications for Municipal Office

Montana law states that “No person is eligible to any municipal office, elective or appointive: (1) who is not a citizen of the United States ; and (2) who has not met the qualifications prescribed by law or by ordinance adopted by the governing body of the city or town.”

### 1.503 Oath of Office Required

As stated in [7-1-4137, MCA](#), before performing any official duties, *every elected and appointed municipal officer must take the oath of office* prescribed in [Article III, section 3](#) of the Montana Constitution. The oath, set forth below, may be administered by the mayor, the city or town clerk or any other person authorized by law to administer oaths. It must be filed with the county election administrator and with the city or town clerk. No other oath, declaration, or test shall be required as a qualification for office.

*“I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity. (So help me God).”*

### **1.504 Compensation of Municipal Officers**

The salaries and compensation of all municipal officers and employees shall be determined by ordinance or resolution adopted by the city or town council [7-4-4201, MCA](#).

### **1.505 Vacancies in Municipal Office**

A vacancy in a municipal office, such as the office of mayor or member of the council, occurs as prescribed by law and includes such occurrences as: death, resignation or removal from office of the incumbent or the incumbent's absence from the city or town for 10 days without the consent of the council. A vacancy may also arise as a result of the incumbent's "open neglect or refusal to discharge duties," ceasing to be a resident of the municipality, or conviction of a felony. (See [7-4-4111, MCA](#), for a complete listing of occurrences which will cause a vacancy in municipal office.) A determination that a vacancy exists in an elected municipal office should be recorded in the minutes of a council meeting.

### **1.506 Method of Filling Vacancies in Office**

A vacancy in an elected municipal office must be filled by *majority vote of the council within 30 days* of the occurrence of the vacancy [7-4-4112, MCA](#).

The person appointed to fill the vacancy must possess the required qualifications for the office, including residency in the ward of a vacant, ward-based council seat.

The person appointed to fill the vacancy may serve until the expiration of the term of office of the council member who created the vacancy, except that the position shall be open for nomination and election at the next *available* municipal election. If a vacancy occurs during the first two years of a four-year term, the position will be open for election in the next *available* election and the successful candidate will serve the unexpired term of the office (a two year term for the successful candidate). If the vacancy occurs during the second half of a four-year term of office, the person appointed to fill the vacancy will serve until the expiration of the original term of office, thus maintaining the usual overlapping terms of council office.

### **1.507 Principal Statutes Related to Municipal Officers**

1. [7-1-4121\(11\), MCA](#)
2. [7-1-4137, MCA](#)
3. [7-4-4101](#) through [4103, MCA](#)
4. [7-4-4111, MCA](#)
5. [7-4-4112, MCA](#)

## **1.6 CITY AND MUNICIPAL COURTS**

### **1.601 Local Courts of Limited Jurisdiction**

Courts of limited jurisdiction (as distinct from district courts with felony jurisdiction) are those local courts which deal

with local ordinances, residential and commercial landlord/tenant disputes, forcible entry and detainer (unlawful keeping of another person's goods), collection of certain taxes, fees and assessments, and, most frequently, misdemeanor criminal charges. Misdemeanors are those offenses punishable by a fine not exceeding \$500 or imprisonment not exceeding six months. A civil action may be brought in a court of limited jurisdiction if the disputed sum does not exceed \$7,000 (exclusive of court costs). The two kinds of courts of limited jurisdiction found in Montana's cities and towns are the *city court* and the *municipal court*, each of which is described below.

### 1.602 City and Municipal Courts

Eighty-three of Montana's 127 cities and towns have a *city court*. Five cities (Bozeman, Billings, Great Falls, Helena and Missoula) have a *municipal court* which is also a court of limited jurisdiction but, unlike a city court, a municipal court is a *court of record*, as described below. The criminal jurisdiction of city and municipal courts is *limited to misdemeanors*, which are almost entirely violations of city or town ordinances, predominantly traffic-related offenses.

### 1.603 City Courts

Even though state law does not mandate that a *city court judge* be an attorney, several are because this additional qualification may be set forth in a city or town ordinance [3-11-202, MCA](#). The city and town councils of Montana's 115 Class 3 Cities and Towns *may decide by ordinance whether to appoint or elect the city judge* to the required four year term of office, [7-4-4102](#) and [4103, MCA](#). Most are elected, *as are all the city judges in class 1 and class 2 cities*. However, a number of *smaller cities and towns choose to appoint a city judge from a neighboring city or town or to appoint a willing county justice of the peace as the city judge*. *Approximately 38 county justices of the peace also serve as city judges*.

### 1.604 Municipal Courts

Unlike a city court or justice court, *a municipal court is a court of record* and, therefore, appeals from its decisions do not require re-trial by a district court, which may review the case upon appeal based upon the court record created in the original municipal court proceeding. The five municipal courts have the same jurisdiction as city courts but, unlike city courts, *municipal court judges must be elected and must have the same qualifications as a district court judge except that a municipal court judge must have been admitted to practice for only three years* [3-6-202, MCA](#).

### 1.605 Court Revenues

While local courts often collect fees from litigants or defendants, the municipal government cannot impose a certain collection rate or revenue expectation upon the court. State law provides great leeway to judges to reduce or waive fees especially when a defendant is indigent.

The revenue from the fines and forfeitures imposed by city and municipal courts can be substantial and all such revenues are deposited directly into the municipality's general fund. For example, the court revenues from one of Montana's larger municipalities exceeded \$750,000, as compared to the court's operating budget of about \$200,000, and therefore resulted in a half million dollar contribution to the city's general fund budget. Certainly *the purpose of any court is not to serve as a revenue center for government* but, rather to create and maintain the expectation of justice in the community.

Nevertheless, city and municipal courts remain important contributors to a balanced budget in most municipalities. It is important to note, however, that included in a municipal budget is the cost of the police department and the city attorney's office, both of which, along with the court itself, are essential public safety components of the community's

justice system.

### **1.606 The Court's Relationship to the Legislative and Executive Branches**

Judges and court staff are part of a separate branch of government. Neither the Executive Branch nor the Legislative Branch may interfere in the daily workings of the Judicial Branch. *Neither the council nor the mayor has authority to supervise, discipline or remove a judge during the judge's four-year term of office.*

The council appoints the judge for a four-year term. If a vacancy occurs during the judge's term of office, the council must appoint a new judge to serve out the remainder of the term. *The new judge cannot perform any judicial acts until the Montana Supreme Court Administrator's Office has been notified of the appointment and the newly appointed judge has received a waiver of training.*

All limited jurisdiction judges are required to attend twice yearly trainings and to pass a certification test upon appointment or election and every four years thereafter. The local government is responsible for paying the registration and travel expenses associated with these mandatory trainings.

# **CHAPTER II**

## **GOVERNING THE MUNICIPALITY**

by  
Kenneth L. Weaver, Ph.D.

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## 2.1 ROLES AND RESPONSIBILITIES

### 2.101 The Chief Executive

**Mayor is the chief executive.** In the commission-executive (council-mayor) and commission-presiding officer form of municipal government, *the mayor is the chief executive* as a matter of law or as provided in the locally adopted charter. In the Commission-manager form of municipal government *the city manager is the chief executive officer and the mayor serves primarily as the presiding officer of the commission* with some ceremonial responsibilities.

**Duties of the mayor.** The primary duties of the mayor as the chief executive officer of the city or town government are detailed at [7-3-203](#), [7-4-4303](#) and [7-5-4102, MCA](#) unless otherwise altered by a locally adopted charter. Foremost among these duties of the mayor is the duty to *enforce state laws and the ordinances and resolutions* adopted by the council. In meeting this responsibility, the mayor is empowered to administer the affairs of the government and supervise all departments and all employees of the city or town. In this regard, it is important to note that in most council-mayor governments the mayor is required to obtain council approval to hire the department heads. However, the mayor has the authority to terminate *for just cause* all non-elected employees of the government, including department heads, and *to do so without reference to the council*, [7-3-213\(3\)](#) and [7-3-113\(1\)\(e\), MCA](#).

**Presiding officer of council.** In most municipal governments the mayor serves as the presiding officer of the council, but *the mayor is not a member of the council and may not be counted among the number necessary to make a quorum*. As the presiding officer of the council the mayor usually prepares the meeting agenda with the assistance of the clerk. The mayor may take part in the discussions of the council but must take care that established council procedures are followed and that each member of the council is treated fairly and with the respect due an elected representative of the community. *The mayor may not vote as other council members but may vote only to break a tie vote of the council*. As presiding officer, the mayor must ensure that members of the public who appear before the council are accorded a reasonable opportunity to present their views and are treated with respect.

**Mayor's veto authority.** Although seldom used, the mayor's authority to veto ordinances and resolutions is an important check and balance in the council-mayor form of municipal government. (The veto is not available to the mayor in the commission-manager form of government.) To exercise veto authority the *mayor must submit in writing his veto and all objections to the pending ordinance or resolution to the council at the next regular meeting*. The council may only *override the mayor's veto of a measure by two thirds vote of the whole number of council members*. If the council fails to override the veto, the ordinance or resolution *must not go into effect* [7-3-214\(2\)](#), [7-3-113\(1\)\(f\)](#) and [7-5-4206, MCA](#).

**Budget preparation.** In most council-mayor forms of municipal government the mayor, with assistance from the clerk/treasurer, has the lead role in assembling the annual budget. However, the relevant statute requires that the mayor prepare the budget ". . . in consultation with the commission and departments heads" [7-3-215\(2\), MCA](#) and [7-3-113\(1\)\(g\), MCA](#). More often than not, a committee of council members serves as the council's working participants in the budgeting process. Although the assembly of budget details is usually accomplished by the executive branch (primarily the clerk) for the mayor's approval, *only the council can finally approve the budget for execution by the executive branch* [7-3-203\(10\), MCA](#).

## 2.102 The Council (Commission)

In all forms of municipal government in Montana the *council (which may be called the commission)* is the governing body. The term commission is often used in commission-manager form of municipal government, whereas the term council is commonly used to refer to the governing body in the council- mayor form of government. The two terms are interchangeable.

**Legislative powers.** All local legislative powers are vested by law in the governing body [7-1-4122, MCA](#) and specifically include the legislative power, subject to state law, to *adopt, amend and repeal ordinances and resolutions* required to: [7-1-4123, MCA](#)

1. Preserve peace and order and secure freedom from dangerous or noxious activities;
2. Secure and promote the general public health and welfare;
3. Provide any service or perform any function authorized or required by state law;
4. Exercise any power granted by state law;
5. Levy any tax, subject to the limits imposed by [15-10-420](#), authorized by state law for public or governmental purposes as described in [7-6-2527, MCA](#);
6. Appropriate public funds;
7. Impose a special assessment reasonably related to the cost of any special service or special benefit provided by the municipality or impose a fee for the provision of a service;
8. Grant franchises; and
9. Provide for its own organization and the management of its affairs.

**Quorum required.** All of the powers indicated above, and any other power exercised by the governing body may only be exercised by the *affirmative vote of a majority of the council members physically present or connected by electronic means in a lawful meeting of the council comprised of no less than a quorum (majority) of the whole number of council members*. A city or town council of four members requires the participation of at least three of its members (not including the mayor) to constitute a quorum. In turn, that quorum of three must deliver at least a majority of two affirmative votes to adopt any measure. (Some measures require a super majority for adoption.) If the entire council of four members is present, a majority of three votes would be required to adopt a measure.

**Voting is council member's governing power.** Upon reflection, a prudent council/ commission member will realize that the only governing power he or she possesses is the power to vote on issues before the commission. A vote for or against a measure is the extent of an individual member's governing power.

**President of the council.** The council is enabled by law to elect from among its number an individual member to serve as presiding officer of the council *in the absence of the mayor* [7-4-4403](#) and [7-3-220, MCA](#). This position is commonly referred to as the *president of the council*. The individual retains all of the voting rights of a council member and does not assume any other responsibility of the mayor.

**Legislative committees.** Although not required by law, most municipal councils in the council---mayor form of government establish working committees comprised of some number of members less than a quorum of the whole council. The members of these legislative committees should be appointed for a term by resolution of the council.

The role of these legislative committees is to study pending issues in detail in order to make knowledgeable recommendations to the whole council. The most frequently encountered legislative Committees are: budget and finance, public works, parks and recreation, and streets and alleys committees. Encountered in some governments is "personnel" or "human resource" committee. In general, the creation of such a committee opens the door to significant conflict with the executive branch and may expose the government to considerable risk of violating the

privacy rights of individual employees. *The creation of a “personnel committee” is not recommended.* A grievance committee, on the other hand, may serve a useful appellate function to review certain employee grievances arising in the executive branch. Such a committee should only be created as an integral component of a carefully crafted and *legally sufficient grievance policy* developed by the executive branch for consideration by the council. (See Chapter III Human Resource Management for a detailed discussion of municipal grievance policies.)

### 2.103 The Municipal Clerk

*See Part II of this Handbook for a comprehensive and detailed presentation of the duties and responsibilities of the municipal clerk and clerk-treasurer along with model policies and standard operating procedures.*

**Clerk of the council.** In virtually all of Montana’s 127 municipal governments, the clerk is critical to communication and coordination between the two branches of government. The city or town clerk usually serves as the recording clerk of the council responsible for posting the legally required notice of the council meetings and the preparation of the legally required minutes of all council meetings. As well, the clerk is responsible for the authentication of all ordinances and resolutions adopted by the council and entering these into a systematic file of resolutions or into the required “Ordinance Book,” which must be re-codified every five years [7-4-4501](#), [7-4-4511](#), [7-4-4512](#), [7-4-4513](#), [7-5-107](#) and [7-5-4201](#), MCA.

**Officer of the executive branch.** Even though providing essential administrative support to the council, the clerk is also an executive branch officer and department head who usually serves as administrative assistant to the mayor; for example, assisting with the budget and preparing the agenda for council meetings.

**Clerk-Treasurer.** In almost all units of the council-mayor form of municipal government in Montana the city or town clerk also serves as the “treasurer” and is referred to as the “clerk- treasurer.” Most often in this role the clerk-treasurer is essentially the “chief financial officer” of the municipality. As such, the clerk-treasurer is responsible to the mayor for the municipal accounting system, the billing and collecting of all utility fees (such as the water and waste water service fees), the processing of all claims for payment for approval by the council and mayor, and the assembly of the annual operating budgets for as many as 20 separate governmental funds. At the conclusion of the fiscal year, the clerk-treasurer is responsible for the preparation of the required Annual Financial Report (AFR) for submission to the state Department of Administration. (See [7-4-4101](#), [4102](#) and [4103](#), MCA and especially [7-4-4106](#), MCA for authority to consolidate the offices of clerk and treasurer.)

### 2.104 The City Attorney

The appointment of a city attorney is not required by law but is thought by many local officials to be a practical necessity and is common practice in all classes of cities and towns. To be appointed as a city attorney the person must have been licensed to practice as an attorney in Montana. If the attorney is to serve as an independent contractor, rather than as an in-house employee in the larger municipalities, the two-year appointment required by law is made by the mayor and is subject to the approval of the city or town council. *The appointment should take the form of a two-year written contract* that specifies the duties expected to be performed for the government by the city attorney, the amount and type of compensation, and the supervising official.

The duties of the city attorney that are required by law [7-4-4604](#), MCA include:

1. Appear before the city court and other courts and prosecute on behalf of the city;
2. Serve upon the attorney general within 10 days of the filing or receipt a copy of any notice of appeal that the city attorney files or receives in a criminal proceeding;

3. When required, draft for the city council contracts and ordinances for the government of the city;
4. When required, give to the mayor or city council written opinions on questions pertaining to the duties and the rights, liabilities, and powers of the city; and
5. Perform other duties that pertain to the functions of the city council or that the city council prescribes by resolution.

The engagement of a city attorney does not prevent the city or town council from retaining separate legal counsel to provide additional legal services such as specialized representation or litigation.

## 2.105 The Department Heads

In all cities and towns, the delivery of essential municipal services is provided by the several departments that comprise the operating capacity of a municipal government. With significant variation depending upon the size of the government, these service delivery departments usually include:

- Police Department
- Fire Department (required only in Class 1 and Class 2 Cities)
- Public Works Department
- Public Utilities Departments
- Parks and Recreation
- Planning Department
- Administration Department
- Finance Department

The duties and responsibilities of each of these departments are generally defined in state law and should be detailed in local operating policies prepared by the executive and approved by the council. Here it is important to note that the heads of these departments in the council-mayor form of government are *appointed (hired) by the mayor with the consent of the commission* and are supervised by the mayor unless otherwise provided by ordinance. However, the *department heads may be terminated for "just cause" by the mayor without reference to the council*, as is the case with all other employees of the municipal government.

Prudent council members will take care to *deal with department heads through the mayor or city manager* so as to avoid any possibility of disrupting the supervisory chain of command. The individual likely to be compromised in such a circumstance, as too often occurs in municipal government, is not the council member nor the mayor but the department head, who is, after all, *supervised solely by the mayor*.

## 2.106 Executive Supervisory Role vs. Legislative Oversight Role

One of the most persistent and disabling problems encountered in the council-mayor form of municipal government is confusion concerning the proper roles of the mayor and council members in supervising employees of the government, especially the department heads.

The *supervisory powers of the mayor* are set forth in some detail at [7-3-113](#), [7-3-213\(3\)](#), [7-3--216\(2\)](#), and [7-4-4303, MCA](#). It is reasonably clear that these sections of law contemplate that the mayor, not the council, is to exercise supervisory responsibility for all departments and employees.

On the other hand, the *legislative oversight* responsibilities of the council are set forth primarily at [7-3-203](#) (4), (6), (7) and (8), MCA and even more directly at [7-5-4101, MCA](#). These sections of law make clear that the *council's role is to set policy in the form of ordinances and resolutions* and then to ensure that those policies are

carried into effect by empowering the council to require the mayor to report to the council on the affairs and financial condition of the government and *such other matters as the council may require*.

Perhaps because the citizen-volunteers who have been elected to govern their community are real people who may or may not have had previous experience in government or any other complex organization, the challenge of maintaining a *working balance between executive supervision and legislative oversight is problematic*. It may be helpful for these elected officials to think of the corporate model of the C.E.O. who runs the business and the Board of Directors that sets the goals and policies of the firm. This is the model that most Montana school boards employ quite successfully and is the model that characterizes the commission-manager form of municipal government wherein the commission is specifically admonished in law to refrain from giving any orders to the municipal employees or even dealing with employees except through the city manager.

While such rigid separation of the executive and legislative roles may not be functionally practical in the smaller units of the council-mayor form of government, it is nevertheless critical that council members, especially newly elected council members, refrain from involving themselves in the supervision of the municipal staff. That is the mayor's job. The council's job is to work through the mayor to ensure that the council's policies are being carried out as the council intended.

Effective and efficient governance in the municipal council-mayor form of government depends upon reciprocal *respect for the municipal officials who comprise the "fragile triangle" of governing responsibilities: the council-the mayor-the department heads*. Reciprocal respect among these municipal officials will almost certainly result in a more efficient municipal government. And when absent, the ability of these officials to govern as a team will almost certainly be lost and will probably result in paralysis of the government and an erosion of citizen trust in the ability of the government to serve its community.

## 2.107 Boards and Commissions

A number of boards and commissions are either required or enabled by law to be created and staffed by appointment of the governing body. Additionally, both the mayor and the council have wide discretion to create virtually any advisory committees viewed as necessary or convenient to promote the public health, safety and welfare and to appoint citizens to serve on these committees. Such citizen advisory committees should be created by resolution of the council, which should include the appointment process to be followed by the mayor and council. These ad hoc, *citizen advisory committees* should not be confused with the *legislative committees* described in Section 2.102.

The size, membership tenure and scope of responsibility of most of the required boards or commissions are set forth in statute, as cited below:

<b>Board Name</b>	<b>Enabling Statute</b>
Board of Adjustment	<a href="#">76-2-321, MCA</a>
Cemetery District Board of Trustees	<a href="#">7-35-2131, MCA</a>
Library Board of Trustees	<a href="#">22-1-308, MCA</a>
Planning Board	<a href="#">76-1-221, MCA</a>
Police Commission	<a href="#">7-32-4151, MCA</a>
Zoning Commission	<a href="#">76-2-307, MCA</a>

For more information on serving on boards and specific board statute, please refer to the Montana Local Government Board Handbook published by the Local Government Center. This publication may be purchased

through the MSU Extension Distribution Center by calling (406) 994-3273, or online at <http://www.msulocalgov.org/publications/index.html>.

## 2.2 LEGAL RESPONSIBILITIES AND LIMITATIONS

### 2.201 The Law of Local Government

Much, but by no means all, of the statutory law that prescribes the forms, powers, duties and limitations of local government in Montana is set forth in *Title 7 of the Montana Code Annotated*. However, a substantial amount of statutory law impacting local government operations is to be found in other Titles of the Montana Code. For example, Title 76 contains most of statutes dealing with the land use decisions that must be made by municipal governments including *growth policy requirements*, subdivision review and zoning requirements and limitations. Title 39 encompasses labor law including the obligations of local government in dealing with collectively bargained employees (unions) and Title 2 includes both the “Standards of Conduct” required of local officials and the constitutionally required procedures to protect the rights of Montana citizens in dealing with their local government. In short, a great deal of statutory law related to local government is scattered throughout the ten volumes encompassing all 99 titles of the Montana State Code.

Moreover, it is important to remember that the law enabling and limiting local officials in the performance of their governing duties includes *much more than statutory law*. The interpretation of the statutes rendered by the state’s Attorney General and reported as AG Opinions along with the decisions of Montana’s district courts and State Supreme Court are also part of the fabric of local government law that is binding on all local officials.

*Hence, prudent mayors and council members recognize the need for the assistance and legal counsel of an experienced city attorney and will understand that this handbook is not and cannot be a substitute for competent legal opinion. Rather, this handbook is intended to serve merely as an easily accessible first reference for local officials seeking an entry point into the resolution of common municipal issues. The statutory citations included herein are provided primarily for the convenience of the consulting city attorney who may be new to the local government venue and unfamiliar with the unusual organization of Title 7.*

A municipal official seeking a particular section of law needs to understand that the Montana Code Annotated is topically arranged (e.g. Title 7 is Local Government) and is further organized in a title-chapter-part-section format. For example:

**Title 7 Local Government**  
**Chapter 1 General Provisions**  
**Part 41 Municipal Governments Section 4121**  
**General definitions**

Section [7-1-4121, MCA](#) provides a useful set of definitions of terms commonly found in Title 7. In fact, these terms and definitions are so useful they are included in their entirety at the end of this Section.

## 2.202 Legal Requirements and Limitations

There are a number of specific legal requirements that are of such significance to the lawful conduct of municipal government that they deserve particular emphasis, especially for the newly elected municipal official. Each of these legal imperatives is described briefly below and each merits discussion with the City Attorney.

### 2.203 Limits of Jurisdiction

*Montana law imposes both territorial limits and subject matter limits on the governing authority of municipal governments.* For example, ordinances adopted by the council do not, in general, apply outside of the defined city or town territorial limits of the municipality. However, there are certain exceptions to this rule such as the authority of the mayor to enforce health and quarantine ordinances within five miles of the city or town boundaries *if empowered to do so by an ordinance, which has also been approved by the county commission.* Additionally, a municipal government may, under certain circumstances, exercise *extraterritorial jurisdiction* by extending the application of its zoning or subdivision regulations beyond its limits in any direction subject to distance limits based upon the classification of the city or town.

*Subject matter limits on the jurisdiction of a municipality are set forth explicitly in Chapter 1, Part 1, Title 7, especially.* For example, local governments (including those with self-government powers) are specifically **denied** the following:

- Any power that applies to or affects the public-school system;
- Any power that defines an offense as a felony or fixes a penalty for a misdemeanor in excess of a fine of \$500 or a sentence of six months imprisonment
- Any power that affects the right to keep and bear firearms, except the power to regulate the carrying of a concealed weapon.

Local government officials are specifically denied numerous other governing powers and still other powers require a specific delegation by the legislature, notably certain taxation powers. *In general, these provisions of law are a prohibition on local governments from acting except as provided by law. These prohibitions also extend to those units of municipal government that possess self-government powers.* (See Section 1.4 for a discussion of self-government powers and general powers governments.)

*In short, the governing powers of a Montana municipality are limited by law and by the United States and Montana Constitutions. It is therefore imperative that, before acting on any matter that may be beyond the jurisdiction of a city or town government, municipal officials seek the legal opinion of the city attorney.*

### 2.204 Due Process Required

In the United States it is a canon of law as ancient as Magna Charta (1215 AD) that no government may deprive a person of life, liberty or property without *due process of law*. Thus, for example, when a mayor decides that an employee should be terminated for just cause, the employee must be informed of the reason for the threatened termination and accorded timely opportunity to rebut the basis for the termination and to appeal the termination decision to a higher authority. Failure to afford *due process* in discharging a municipal employee will almost certainly result in a *wrongful termination* cause of action against the city or town.

When a city council wants to change the zoning status of a neighborhood in order to accommodate a prospective business development, *due process* requirements include timely notice of the proposed zone change to the entire

neighborhood and the opportunity of the property owners to present objections to the proposed change *before the decision is made by the council*. Failure by the council to faithfully observe *due process* requirements may well result in an *unlawful taking action* suit that will require lengthy and very expensive litigation to resolve.

As suggested above, specific due process requirements will vary depending upon the kind of action being contemplated by municipal officials. It is therefore *imperative that the city attorney be consulted prior to any final decision* to ensure that the city or town government has firm legal footing.

## 2.205 Standards of Conduct for Public Officials

The language adopted by the legislature when enacting the “Code of Ethics” for public officials (a term which includes local elected officials and employees) is instructive:

*The holding of public office or employment is a public trust created by the confidence the electorate reposes in the integrity of public officers, legislators and public employees. A public officer, legislator or public employee shall carry out the individual’s duties for the benefit of the people of the state. A public officer, legislator or public employee whose conduct departs from the person’s public duty is liable to the people of the state and is subject to the penalties provided in this part for abuse of the public’s trust [2-2-103, MCA](#).*

Among other enumerated transgressions included in the Standards of Conduct for public officials are the following prohibited activities:

Accepting a *gift of substantial value* that would tend improperly to influence a reasonable person to depart from the faithful and impartial discharge of the person’s public duties [2-2-104, MCA](#). By definition, a gift of substantial value means a gift with a value of \$50 or more for an individual [2-2-102, MCA](#).

1. Use of public time, facilities, equipment, supplies, personnel or funds for the officer’s or employee’s private business purposes [2-2-121, MCA](#).
2. Use of public time, facilities, equipment, supplies, personnel or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue [2-2-121, MCA](#).
3. Participating in a council proceeding when an organization, *including non---profit organizations*, of which the public official is an *officer or director* is involved in the council proceeding or is seeking to influence a decision of the council [2-2-121\(5\), MCA](#).

Any one of these and several other prohibited activities are legal and political mine fields that should be absolutely avoided by municipal officers and employees. *Any question about the propriety of engaging in any such activities or similar activities should be addressed by the city attorney prior to initiating the activity.*

## 2.206 Conflict of Interest

Municipal officials and employees must not have a *private interest* that will be affected by performing a n official duty, such as voting as a member of the city or town council or supervising municipal employees. Most commonly, a *private interest* means an interest held by an individual or relative that is an *ownership, directorship or officership interest in a business or real property* [2-2-102\(6\), MCA](#). However, certain official acts of a member of a local governing body may be permitted even if a conflict of interest exists if the member’s vote is necessary to form a quorum or otherwise enable the governing body to act. In this instance, the *member must disclose the conflict of interest to the Commissioner of Political Practices in Helena before voting* [2-2-121\(10\)](#) and [2-2-131, MCA](#).

Additionally, and more specifically, the mayor or a member of the council or any officer of the government or any relative or employee of these officers *may not be directly or indirectly interested in the profits of any contract entered into by the council* [7-5-4109, MCA](#). The governing body may, upon due consideration of certain factors, grant a waiver of this prohibition by publicly disclosing the nature of the conflict at a properly noticed public hearing.

As a practical matter it is always a good idea to *discuss a potential conflict of interest with the city attorney and to do so prior to performing an official act* that may be in conflict with a private interest. If, after consulting with the city attorney, an individual believes that he/she will be in a conflict situation and must therefore refrain from participating or voting on the matter, it is a very good idea to avoid surprising the presiding officer and members of the council by waiting until the voting process to declare abstention. Additionally, declaring a possible conflict of interest when none exists simply to avoid voting on a controversial issue does a disservice to one's government and to his/her constituents.

### **2.207 Dealing with Misconduct of Elected Officials**

Although seldom employed, [7-5-4103, MCA](#) enables a city or town council to deal with improper conduct of a member by imposing appropriate punishment such as a vote of censure or, in extreme cases, expulsion from the council by a two-thirds vote of the members. Certainly, no such action should be taken prior to a discussion of the situation and an appropriate remedy with the city attorney.

Additionally, [7-4-4111, MCA](#) provides that a vacancy in the office of mayor or council member occurs under certain enumerated circumstances, among which are included the incumbent's open neglect or refusal to discharge duties, or the officer's *conviction* of a felony offense. A vacancy in office requires that the council must fill the vacancy within 30 days by appointing a person qualified to hold the position pursuant to [7-4-4112, MCA](#).

Montana's Recall Act [2-16-601, MCA](#) provides that 20 percent of a municipality's voters may file a petition for the recall of an elected or appointed municipal official who has violated the official's oath of office for official misconduct, for conviction of a felony, or for incompetence or lack of physical or mental fitness. However, *"No person may be recalled for performing a mandatory duty of the office or for not performing any act that, if performed, would subject him to prosecution for official misconduct"* [2-16-603, MCA](#).

### **2.208 Hatch Act Limits on Political Activities**

The Hatch Act (5 U.S.C. 1501--1508) restricts the partisan political activity of individuals employed by state or local executive agencies who work in connection with programs financed in whole or in part by federal loans or grants. The following list offers examples of the types of programs which frequently receive financial assistance from the federal government: public health, public welfare, housing, urban renewal and area redevelopment, employment security, labor and industry training, public works, conservation, agricultural, civil defense, transportation, anti--poverty, and law enforcement programs.

State and local employees subject to the Hatch Act continue to be covered while on annual leave, sick leave, leave without pay, administrative leave or furlough. However, Hatch Act provisions do not apply to individuals who exercise no functions in connection with federally financed activities. The law also exempts certain specified employees from the prohibition on candidacy for elective office. These exemptions include:

1. The mayor of a city;

2. A duly elected head of an executive department municipal department who is not classified under a state or municipal merit or civil service system; and
3. An individual holding public elective office.

In general, the following rules apply under the Hatch Act:

**Municipal employees:**

- **May** be a candidate for public office in a *nonpartisan* election.
- **May** campaign for and hold elective office in political clubs and organizations.
- **May** actively campaign for candidates for public office in *partisan and nonpartisan elections*.
- **May** contribute money to political organizations or attend political fundraising functions.
- **May** participate in any activity not specifically prohibited by law or regulation.

**Municipal employees:**

- **May not** be a candidate for public office in a partisan election
- **May not** use official authority or influence for the purpose of interfering with or affecting the results of an election or a nomination for office
- **May not** directly or indirectly coerce contributions from subordinates in support of political party or candidate.

Municipal employees should not rely on the opinions of friends or co-workers when they have questions with regard to a specific political activity. Ignorance of the law does not excuse an employee's violation of the Hatch Act. Reliance on incorrect or unofficial information also does not excuse a violation. The above information is quoted in large part from the web page of the U.S. Office of Special Counsel, [www.osc.gov](http://www.osc.gov).

## 2.209 Common Municipal Definitions

**7-1-4121. General definitions.** As used in [7-1-4121](#) through [7-1-4127](#), and [7-1-4129](#) through [7-1-4149](#), MCA unless otherwise provided, the following definitions apply:

1. **Charter** means a written document defining the powers, structure, privileges, rights, and duties of the government and limitations on the government.
2. **Chief executive** means the elected executive in a government adopting the commission--- executive form, the manager in a government adopting the commission-manager form, the presiding officer in a government adopting the commission-presiding officer form, the town presiding officer in a government adopting the town meeting form, the commission acting as a body in a government adopting the commission form, or the officer or officers designated in the charter in a government adopting a charter.
3. **Elector** means a resident of the municipality qualified and registered to vote under state law.
4. **Employee** means a person other than an officer who is employed by a municipality.
5. **Executive branch** means that part of the municipality, including departments, offices, and boards, charged with implementing actions approved and administering policies adopted by the governing body of the local government or performing the duties required by law.
6. **Governing body** means the commission or town meeting legislative body established in the alternative form of local government.
7. **Guideline** means a suggested or recommended standard or procedure to serve as an index of comparison and is not enforceable as a regulation.
8. **Law** means a statute enacted by the legislature of Montana and approved and signed by the governor

or a statute adopted by the people of Montana through statutory initiative procedures.

9. **Municipality** means an entity that incorporates as a city or town.
10. **Office of the municipality** means the permanent location of the seat of government from which the records administrator, or the office of the clerk of the governing body if one is appointed, carries out the duties of the records administrator.
11. **Officer** means a person holding a position with a municipality that is ordinarily filled by election or, in those municipalities with a manager, the manager.
12. **Ordinance** means an act that is adopted and approved by a municipality and that has effect only within the jurisdiction of the local government.
13. **Person** means any individual, firm, partnership, company, corporation, trust, trustee, assignee or other representative, association, or other organized group.
14. **Plan of government** means a certificate submitted by a governing body that documents the basic form of government selected, including all applicable sub options. The plan must establish the terms of all officers and the number of commissioners, if any, to be elected
15. **Political subdivision** refers to a local government, authority, school district, or multicounty agency.
16. **Population** means the number of inhabitants as determined by an official federal, state, or local censor official population estimate approved by the department of commerce.
17. **Printed** means the act of reproducing a design on a surface by any process as defined by [1-1-203\(4\)](#).
18. **Public agency** means a political subdivision, Indian tribal council, state or federal department or office, or the Dominion of Canada or any provincial department, office or political subdivision.
19. **Public property** means any property owned by a municipality or held in the name of a municipality by any of the departments, boards, or authorities of the local government.
20. **Real property** means lands, structures, buildings, and interests in land, including lands under water and riparian rights, and all things and rights usually included within the term "real property", including not only fee simple absolute but also all lesser interests, such as easements, rights-of-way, uses, leases, licenses, and all other incorporeal hereditaments and every estate, interest, or right, legal or equitable, pertaining to real property.
21. **Reproduced** means the act of reproducing a design on any surface by any process.
22. **Resolution** means a statement of policy by the governing body or an order by the governing body that a specific action be taken.
23. **Service** means an authorized function or activity performed by local government.
24. **Structure** means the entire governmental organization through which a local government carries out its duties, functions, and responsibilities.

## 2.3 ORDINANCES AND RESOLUTIONS

### 2.301 Authority to Adopt Ordinances and Resolution

Montana law at [7-1-4123](#) and [7-1-4124](#) specifically authorize municipalities to adopt, amend and repeal ordinances and resolutions that are required to:

1. Preserve peace and order and secure freedom from dangerous or noxious activities;
2. Secure and promote the general public health and welfare;
3. Provide any service or perform any function authorized or required by state law;

4. Exercise any power granted by state law;
5. Levy any tax authorized by state law for public or governmental purposes subject to [15-10-420](#);
6. Appropriate public funds;
7. Impose a special assessment reasonably related to the cost of any special service or special benefit provided by the municipality or impose a fee for the provision of a service;
8. Grant franchises; and
9. Provide for its own organization and the management of its affairs.

All legislative actions by a municipal council take the form of either an ordinance or resolution.

## 2.302 Ordinances

An **Ordinance** is an act adopted by a municipal governing body having effect only within the jurisdiction of the municipal government. An ordinance is a municipal law that often imposes a sanction for violation. A *model ordinance is attached at the end of this chapter.*

An **Ordinance** is an act adopted by a municipal governing body having effect only within the jurisdiction of the municipal government. An ordinance is a municipal law that often imposes a sanction for violation. A *model ordinance is attached at the end of this chapter.*

Two separate bodies of state law define the process of adopting, amending or vetoing an ordinance or resolution. *Montana Code Annotated, Title 7, Chapter 5, Parts 1 and 42* both provide specific guidance on the process and, as detailed below, require careful review and attention to detail, most especially with respect to the construction and adoption of a municipal ordinance.

Some critical details in the construction and adoption of a municipal ordinance include:

- While it may not be essential that the city attorney draft every ordinance for consideration by the council, it is a very good idea to require that the *city attorney review every draft ordinance for legal sufficiency prior to final adoption by the council.*
- An ordinance may not contain more than *one comprehensive subject*, which must be clearly expressed in its title [7-5-103, MCA](#).
- An ordinance must be read and *adopted by a majority vote of members present at two meetings of the governing body not less than 12 days apart.* After the first adoption and reading, it must be posted, and copies must be made available to the public [7-5-103, MCA](#). Ordinarily, an ordinance does not require a public hearing prior to final adoption but some subjects of particular concern to the community may justify calling for a public hearing.
- After passage and approval, and unless vetoed, *all ordinances must be signed by the presiding officer of the governing body* and filed with the clerk [7-5-103, MCA](#).
- Except for emergency ordinances, an ordinance *may not go into effect until 30 days after the second reading and final adoption* [7-5-105, MCA](#).
- In the event of an *emergency*, the council may waive the second reading. An ordinance passed in response to an emergency shall recite the facts giving rise to the emergency and *requires a two---thirds vote of the whole governing body* for passage. An emergency ordinance shall be effective on passage and approval and shall *remain effective for no more than 90 days* [7-5-104, MCA](#). *An emergency ordinance shall include only such measures as are immediately necessary for the preservation of peace, health, and safety and shall not include:* [7-5-4204, MCA](#).

1. *A franchise or license to a corporation or individual;*

2. *Any provisions for the sale of real estate;*
  3. *Any lease or letting of any property for a period exceeding 1 year; or*
  4. *The purchase or sale of personal property exceeding \$5,000 in value.*
- All ordinances must be recorded in a book kept by the clerk, called "The Ordinance Book," and numbered by numerical decimal system in the order in which they are passed or codified [7-5-4201, MCA](#). At five-year intervals the ordinances must be compiled or re---codified into a municipal code typically arranged by topic [7-5-107, MCA](#).
  - Except as provided in subsection (2), a local government may fix penalties for the violation of an ordinance that *do not exceed a fine of \$500- or 6-months imprisonment or both the fine and imprisonment.* (2) A local government may fix penalties for the violation of an ordinance relating to local or federal wastewater pretreatment standards implementing the Federal Water Pollution Control Act, 33 U.S.C. 1251 through 1387, if the penalties do not exceed \$1,000 per day for each violation or 6 months imprisonment, or both. [7-5-109, MCA](#)

### 2.303 Resolutions

A **Resolution** is a statement of policy by the governing body or an order by the governing body that a specific action be taken. Resolutions usually apply only within the municipal government itself.

As is the case with ordinances, two separate bodies of state law define the process of adopting or vetoing a resolution. [Title 7, both Parts 1 and 42 of Chapter 5](#) provide specific guidance on the process. **For example:**

- Resolutions may be submitted and adopted at a single meeting of the council [7-5-121, MCA](#).
- Resolutions become effective upon adoption unless a delayed effective date is specified therein [7-5-121, MCA](#).
- After adoption the resolution shall be entered into the minutes and signed by the chairperson of the governing body [7-5-121, MCA](#). While codification of resolutions is not specifically required by law, filing sequentially numbered resolutions in a Resolution Book would greatly facilitate future access, as compared to having to locate the resolution in the minutes of an unknown council meeting. It appears that the clerk is required to do so by [7-4-4501\(2\)](#) and [7-4-4511\(2\),MCA](#).

### 2.304 Vetoing Ordinances and Resolutions

The mayor of a council---mayor form of municipal government (unless prohibited by a locally adopted self---government charter) *may veto any ordinance or resolution* by returning the same to the next regular meeting of the council, with all objections in writing.

No ordinance or resolution vetoed by the mayor may go into effect unless it is afterwards passed (overridden) by *a two---thirds vote of the whole number of members of the council*. If the mayor fails to sign or return any resolution or ordinance, the same takes effect without further action ([7-5-106](#) and [7-5-4206, MCA](#)).

**Attachment 2.1 Model Resolution**

*(Prepare this resolution in your usual resolution format for review by the City Attorney prior to adoption)*

**RESOLUTION No.**\_\_\_\_\_

**A RESOLUTION OF THE CITY/TOWN COUNCIL OF THE CITY/TOWN OF \_\_\_\_\_, MONTANA,  
ESTABLISHING A FORM FOR THE ADOPTION OF TOWN ORDINANCES.**

WHEREAS, Montana law [7-5-103, MCA](#) requires that all ordinances must be submitted in writing in the form prescribed by resolution of the governing body.

**NOW, THEREFORE, BE IT RESOLVED THAT,**

Upon adoption of this resolution, all ordinances to be adopted by the City/Town Council (Commission) of the City/Town of \_\_\_\_\_ shall be prepared in the form provided as attachment to this resolution.

**PASSED AND ADOPTED** by the City/Town Council of the City/Town of \_\_\_\_\_, Montana, at a regular session thereof held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
, Presiding Officer

**ATTEST:**

\_\_\_\_\_  
, City/Town Clerk

**Attachment 2.2 Model Ordinance**

**AN ORDINANCE OF THE CITY/TOWN COUNCIL OF THE CITY/TOWN OF \_\_\_\_\_, MONTANA, PROHIBITING AND PROVIDING A PENALTY FOR VIOLATION.**

**WHEREAS** *(as appropriate)*

**NOW, THEREFORE, BE IT ORDAINED** by the City/Town Council of the City/Town of \_\_\_\_\_, Montana that:

**Section 1.**

**Section 2.** etc.

**Section 3.** *(If appropriate)* Any individual violating the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$ \_\_\_\_\_ nor more than \$500.

**Repealer**

**Section 3.** All resolutions, ordinances and sections of the Municipal Code and parts thereof in conflict herewith are hereby repealed.

**Severability**

**Section 4.** If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provision or application and, to this end, the provisions of this ordinance are declared to be severable.

**Effective Date**

**Section 5.** This ordinance shall be in full force and effect thirty (30) days after passage on second reading.

**References:**

*Cite appropriate statutes or other related Town ordinances*

**PASSED AND ADOPTED** by the City/Town Council (Commission) of the City/Town of \_\_\_\_\_, Montana, at a regular session thereof held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
, Presiding Officer

**ATTEST:**

\_\_\_\_\_  
, City/Town Clerk

**PASSED, ADOPTED AND FINALLY APPROVED** by the City/Town Council (Commission) of the City/Town of \_\_\_\_\_, Montana, at a regular session thereof held on the \_\_\_\_\_ day of \_\_\_\_\_, 20 .

\_\_\_\_\_  
, Presiding Officer

**ATTEST:**

\_\_\_\_\_  
, City/Town Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
, City Attorney

## 2.4 CONDUCT OF COUNCIL MEETINGS

*The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. [2-3-201, MCA](#)*

### 2.401 Public Decision- Making

Montana is one of a number of states whose constitution and laws require that the local government decision-making process be conducted openly and with reasonable opportunity for citizens to participate.

Accountability of government to the people is a central characteristic of Montana's populist traditions and political culture that was incorporated into its 1972 constitution. Moreover, and especially from the perspective of local government, accountability is the basis for the high levels of trust enjoyed by local officials. Two of the most important mechanisms for sustaining public accountability and, therefore, public trust in local government institutions are embedded as fundamental rights in Article II, Sections 8 and 9 of the Montana State Constitution. These are the rights of the people of Montana *to participate* in the decisions of their local government (Section 8) and the right of the people *to know, examine and observe* the deliberations of all public bodies (Section 9). These two enumerated rights, which assure governmental accountability have been implemented in [Title 2, Chapter 3, MCA](#) as Montana's "sunshine laws" and are among the most stringent in the nation.

### 2.402 Open Meetings

There appear to be four essential elements in the Montana "open meetings" law encoded at [2-3-202](#), [203](#), [211](#) and [212, MCA](#):

- If a *quorum* of a local government commission or council is convened by either the physical presence of the members or by means of electronic equipment, such as a conference call; and if
- The commission or council will *hear, discuss or act* upon a matter over which it has supervision, control, jurisdiction or advisory power; then
- The meeting *must be open to the public* and the press must be permitted to photograph, televise or record the proceedings of the meeting; and
- Legally sufficient *minutes* of the meeting must be kept and made available for public inspection.

In brief, if a *quorum* of the local government commission or council meets (whether formally or informally and whether in a public or private facility), to *discuss or hear or act upon a matter over which it has jurisdiction*, it is a *public meeting*. As such, the meeting must be open to the public, including the press, and minutes must be kept of the substance of the meeting.

Moreover, common sense suggests that if the public has not been informed that a quorum of a governing body is planning to convene to discuss the public's business, the public and the press are effectively excluded from the meeting. Hence, *advance notice of any public meeting of a local governing body* is essential to comply with the letter and the spirit of Montana's open meeting law. (See especially A.G. Opinion 51-12, December 2005). Notice requirements and the very few exceptions to the stringent open meeting requirements of public bodies are very important legal issues that *require consultation with the city attorney before the meeting takes place*. Failure to do so may well result in a violation of the open meeting law, followed by expensive litigation and consequent voiding of an important decision.

Finally, it may be useful to recall that the public's confidence and trust in local government officials may be adversely impacted by the *perception* of covert government meetings, even if an erroneous perception. Experienced local officials, who understand this dilemma and know that there is no such thing as anonymity for local officials in a Montana community, will go to considerable lengths to avoid any possible misperception that their governing body chooses to ignore the Montana open meeting law.

## 2.403 Public Participation

State law [2-3-111, MCA](#) requires that every state agency, including local governments, establish procedures that will afford citizens *reasonable opportunity to participate* in the agency's decision-making process by submitting data, views or arguments in written or oral presentations *prior to making a final decision that is of significant interest to the public*.

This requirement is different than and goes beyond the expectations of the open meeting law to require that the city or town council must establish a formal policy and procedure that will ensure that the public will be able to know when and where the governing body is going to decide on a matter of significant public interest. For example, recent opinions of the Attorney General of Montana have held that merely posting the meeting times of a local governing body without providing an agenda of specific issues to be decided does not provide adequate notice and is, therefore, not sufficient to comply with requirements of the participation statute. A city or town council that is too eager to approve a solution in response to a citizen's complaint articulated in the public comment portion of the council meeting, is likely to be in violation of the public participation statute *if the action is of significant public interest and is not included on the council's agenda* and posted or published at least 48 hours prior to the council meeting. Even if there may be a few exceptions, a useful rule for a city or town council to remember is, *if it isn't on the agenda, don't vote!*

## 2.404 Conducting Legal and Efficient Council Meetings

The purpose of a meeting of the city or town council is to accomplish the governing body's work lawfully, in full view of the public and with reasonable opportunity for public participation. Whether the commission's work is carried out efficiently and in an orderly and harmonious manner depends entirely upon each member's determination to do so. A smooth commission meeting that engenders and sustains public trust, especially when the stakes are high, and the audience is hostile, does not require that the council agree with or even like one another. It does require civility and well-practiced meeting procedures.

Civility merely requires individual self-discipline. Procedures, on the other hand, require collective self-discipline. As one sage put it, "Let us agree to disagree with respect." That is precisely the purpose of all legislative procedures. To that end, many deliberative bodies in the United States have incorporated some form of *Robert's Rules of Order* as a guide to their own rules of procedure. So, it is, or at least should be, with Montana's municipal governing bodies.

## 2.405 Rules of Order

Unfortunately, the commonly encountered *Robert's Rules of Order* is as easy to read and understand as your computer's program language. Moreover, it seems that every commission member has her or his own view on the subject. Therefore, it makes some sense to extract from *Robert's* the essential and most commonly used *Rules* and to incorporate them into the commission's own agreed upon procedures that have been formally adopted by commission resolution. (A model policy for council procedures is attached at the end of this section.) Fortunately,

*Robert's Rules* has now been published in a much more user-friendly format and we strongly recommend that the traditional version be discarded and replaced with *Robert's Rules of Order Newly Revised, 10th Edition*. (An abbreviated version of the most common motions is attached at the end of this section.)

It makes even more sense to practice the basic rules of council procedure scrupulously at every meeting and on every council action. By doing so, even on routine issues, the procedures will be well-practiced and therefore second nature to the members when faced with a matter of significant public interest. Here it seems worth emphasizing that deviation from established commission procedures could flaw the final decision. It is precisely when that decision concerns a costly and contentious issue that some dissatisfied party will seek a flaw in the council's decision and virtually any procedural flaw will do nicely. In short, it is seldom a good idea to depart from established policy without a compelling reason to do so.

With commission rules of procedure in place and in practice, the work set forth on the agenda should proceed smoothly, at least most of the time. But, as emphasized above, the agenda itself is an important procedural matter.

### **2.406 Posting the Agenda**

The commission agenda is a legal document that, when posted, provides notice to the public that the commission/council is planning to meet and to conduct the public's business at a certain time and at a certain place. Obviously, if the agenda is to perform this legally required "notice" function it must be posted in a timely fashion (*48 hours before the meeting was established as minimum by A.G. Op. 47, No. 13, 1998*) on a *posting board* located in a predetermined public location, such as the entrance to city hall, the library or the post office ([7-1-4135, MCA](tel:7-1-4135)). Equally obvious is the fact that, if an item is not on the commission agenda, the public cannot reasonably be expected to know in advance that the commission is going to deal with it. Thus, it is nearly always a mistake to conduct any substantive business at a commission meeting that has not been included on that meeting's agenda. If Citizen Smith, or for that matter Commissioner Smith, shows up at the meeting and wants the commission to take action on an item that is not on the agenda, the concern should be acknowledged by scheduling the item for discussion on a future agenda when Citizen Smith's neighbors will also have an opportunity to participate in the proceedings. This procedure, if faithfully followed, will assure an evenhanded approach to community problem-solving and it will also [help retain the integrity](#) of the council members, which is no small accomplishment in most Montana communities.

### **2.407 Assembling the Agenda**

The agenda is the council's plan of work for a particular meeting. Therefore, it makes some sense that the members of the council should know well in advance what work they are expected to perform at any particular meeting. Putting the agenda together, publishing and distributing it along with the supporting documents in a timely fashion is an important responsibility of the presiding officer, usually the mayor, which is most often accomplished with the help of the city or town clerk.

Typically, the mayor and clerk assemble the work items on the agenda from four sources of input:

1. The chief executive who may have knowledge about issues of concern to the governing body;
2. Items brought to the executive by department heads and staff;
3. Items or committee reports submitted by council members for inclusion on the meeting agenda;
4. Items or issues raised directly by citizens with an individual council member.

While there are no procedural rules establishing priorities for items to be scheduled on the agenda, a smart presiding officer will go to considerable lengths to assure that all participants in the process feel confident that their particular items of concern will be scheduled in a timely fashion. By the same token, it makes little sense, except perhaps to deliberately embarrass one's own government, for a council member to force an item on to the agenda prematurely,

especially an item that requires considerable staff time to investigate. In short, building the commission agenda requires cooperation and trust. Absent these crucial elements, the council meeting will be frustrating, fractious and long!

### **2.408 Preparing for the Council Meeting**

One final point concerning the commission meeting agenda may be worth emphasizing, especially for the new commissioner or council member. If a member of the governing body is not willing or able to do the essential agenda homework *before the council meeting*, his/her colleagues on the commission will appreciate the member's silence. It is probable that each council member who did take time away from family or work to prepare for the meeting will not long suffer a colleague who wastes the council's time on matters that should have been cleared up with the mayor or staff before the meeting. In short, an effective member of the governing body is expected to do the necessary homework before, not during the council meeting.

### **2.409 Public Participation**

Well-established procedures and an agenda without surprises will usually produce a smooth council meeting if, and only if, the participating public believes that the council members are being open and fair with them. Even so, it is a virtual certainty that smooth commission meeting procedures will not be sufficient to placate every citizen. It is also important to remember that most of the people, who attend a council meeting, especially those meetings involving a formal public hearing, are there because they are concerned and often angry about an issue that the council is required and expected to handle. Thus, if *before proceeding*, the presiding officer will take the time to explain council procedures for audience participation and whether or not the council is going to make a decision at this meeting, the audience will know what to expect and will, more than likely, wait patiently to participate.

Additionally, council members should refrain from direct interaction with the audience, especially during public hearings. All presentations or comments from the audience should be directed solely to the presiding officer. This not-so-simple-to-enforce but nonetheless important procedure will have the beneficial effect of depersonalizing and reducing the tension of the public discussion. The presiding officer should make this clear at the outset and the commissioners should reinforce it by refraining from direct engagement with the audience verbally or by mannerism, facial expression or gesture.

Curiously, this formalized and unnatural style will usually improve the quality of public input, especially on the most contentious issues. If things still get out of hand, the presiding officer should never be reluctant to call a brief recess to permit a cooling off period for the audience or, in extreme cases, to adjourn the meeting in the interest of public safety. In a public meeting, the person with the gavel must always be conscious that a large number of angry or frustrated people in a confined space is an inherently volatile and potentially even dangerous situation.

### **2.410 Closing the Meeting**

A word about closing commission proceedings to the public may be an appropriate way to end this [section on commission meetings](#). As a general rule in Montana, only the presiding officer may close a commission meeting and then only when the presiding officer makes a finding recorded in the minutes that the right of privacy of an individual clearly exceeds the right of the public to know and to participate in the public's business. *The meaning of this general rule and the few exceptions to it require interpretation by competent legal counsel.* Improperly closing a commission meeting may and probably will result in costly litigation.

In general, there are two acceptable reasons for closing a commission meeting ([MCA 2-3-203](#)). The presiding officer may close the meeting if he or she determines that the “demands of individual privacy clearly exceeds the merits of public disclosure”. The most common individual privacy reasons for closing a meeting are related to personnel issues. The second acceptable reason for closing a meeting is to discuss legal strategy related to litigation. It is acceptable to close a public meeting if the discussions of legal strategy in an open meeting would put the city/town at a disadvantage in pending litigation. Minutes must be taken during closed meetings, however, those minutes must not be made available to the public except by court order ([MCA 2-3-212\(4\)](#)).

### **2.411 Voting by the Council**

Upon the conclusion of council discussion on a pending motion, the presiding officer should call for a roll call vote conducted by the clerk. The sequence of members voting on each motion is rotated by some councils to avoid requiring the same member to initiate (or conclude) the vote on every motion. The clerk should call the name of each member and immediately record that member’s verbal vote so as to avoid later confusion. (See the model voting record for the clerk’s minutes attached at the end of this Section.) Upon concluding the roll call vote, the clerk should announce the results, which should be recorded in the minutes.

As a general rule, members should avoid abstaining from a vote unless, following discussion with the city attorney, the member is certain that a conflict of interest prevents the vote.

There appears to be no clear-cut authority in Montana law enabling *proxy voting* by a council or *remote voting* by a member’s use of electronic equipment, such as a telephone. The practice is of doubtful validity. However, if a council decides to permit voting by a member who is not physically present at the meeting, they should first develop a specific policy setting forth the requirements to do so and ask the city attorney for a *written opinion* as to the legality of the procedure prior to authorizing the practice.

### **2.412 Teamwork is Essential**

Serving as an elected member of a local governing body can and should be an enriching experience that any citizen volunteer can look back upon with special satisfaction and pride that few citizens will ever know. A member of the council will have the opportunity to help make the community a better place to live, to work and to rear families. But no one member of the council can accomplish these noble ends alone. No matter how well conceived an individual member’s “good idea” may be, the idea will require the understanding, support and, ultimately, the votes of a majority of the member’s colleagues on the council if it is to become a reality. Hence, the first rule of governing at the local level is to count. The magic number of affirmative council votes is more often produced by civil cooperation among a majority of the members than by the superior knowledge of any one of them.

### **2.413 Quasi-Judicial Functions of the Governing Body**

The judicial functions of a unit of a municipal government are performed by local courts. However, in Montana it is also true that a governing body itself, from time to time, performs certain decision-making functions that approximate a judicial process. These kinds of decisions by the council are referred to in Montana law as *administrative or quasi-judicial functions* and deserve particular attention.

In general, when a council passes an ordinance it is making “new law” that declares a public purpose to achieve the government’s fundamental mission. In doing so, the council is probably performing a *legislative function*. The initial adoption of a municipal zoning code is a reasonably good example of a purely *legislative act* by a governing body.

However, when that same local governing body makes a policy decision that provides for the *administration of an existing law or policy or applies an existing policy or law* to a particular person or circumstance, it is probably *not* performing a legislative act but, rather, is performing a *quasi-judicial* function.

A quasi-judicial function means that the governing body is exercising its judgment or discretion, often involving its interpretation and application or enforcement of existing policies, rules or law. For example, a fact-finding process by the council; ordering an action or the abatement of an action; adopting rules of procedure; or conducting any public hearing are typical instances of a governing body performing a *quasi-judicial function rather than its more usual legislative function*.

There are several reasons why it is important for a local governing body to recognize the distinction between its purely legislative actions and those decisions of the council or commission that may be quasi-judicial. *If in doubt, the council's presiding officer should certainly seek the guidance of the city attorney concerning procedural requirements to assure a flawless quasi-judicial action by the council.*

At a minimum, any quasi-judicial decision by the council should be supported by a complete record (tape recording that can later be transcribed if needed) of the decision process that is sufficient to enable formal judicial review by a district court. Additionally, all of the procedural safeguards, including legally sufficient notice of the proceeding, should be scrupulously adhered to in order to assure even-handed citizen participation during the hearing process.

## **2.414 Public Hearing Requirements**

Some decisions by the council (for example the adoption of the budget) require that a public hearing be conducted prior to making the decisions. Typically, these decisions involve a *quasi-judicial function* of the council, as described in Section 2.413, above. As noted in [7-1-4131, MCA](#), a properly noticed and conducted public hearing assures reasonable opportunity for citizen participation prior to a final decision by the council. The statute provides that, at a minimum, a public hearing must:

- Provide for submission of both oral and written testimony for and against the action or matter at issue.
- Petitions and letters received by the governing body or executive prior to the hearing shall be entered by reference into the minutes of the governing body and considered as other testimony received at the hearing.

Additionally, public hearings may be held at regular or special meetings of the governing body and may be adjourned from day to day or to a date certain. Except for budget hearings, the governing body may designate a subcommittee or hearing examiner to conduct public hearings.

Experienced council members realize that a public hearing is about listening, and they will avoid challenging or engaging witnesses in argument. Certainly, questions may be asked to clarify the facts, but *the council should reserve discussion of the merits of the issue among themselves until after the hearing is closed.*

### 2.415 Ex Parte Communication by Council Members

Finally, and upon advice of the city attorney, council members should be particularly sensitive to the potential for *ex parte communication* that might flaw their quasi-judicial decision. An example of improper *ex parte communication* would be *any discussion outside of the formal public hearing before the commission or council's final decision has been made*, that might occur between a member of the council and a proponent or opponent of a developer's pending land use application. Any such *ex parte communication* might well be used by an applicant, or by those who might oppose the application, as legal justification to set aside the quasi-judicial decision of the governing body. This will almost certainly be an expensive mistake for a council member to make.

### 2.416 Minutes

Montana law requires that appropriate minutes of all meetings of the council that are required to be open to the public must be kept and made available for inspection by the public [2-3-212, MCA](#) and [7-1-4141, MCA](#). Municipalities are also required to take minutes of closed meetings which are then sealed and secured to prevent compromising the right of privacy of any involved individual and released only by court order.

The responsibility for recording, signing and preserving council minutes is a specific duty of the city or town clerk [7-4-4501](#) and [7-4-4511, MCA](#). Except for the minutes of a public hearing, the minutes of a routine council meeting *need not be verbatim* record but must include [2-3-212, MCA](#):

5. The date, time and place of the meeting;
6. The names of the council members and the mayor in attendance;
7. The substance of all matters proposed, discussed or decided;
8. A record of each individual member's vote on all matters that were voted upon. (See the model voting record for the clerk's minutes attached at the end of this section.)

In short, *the minutes of a routine council meeting should be a brief record of what happened (the proceedings) and not necessarily a record of what was said by council members*. However, the *exact language of any motion should be included in the minutes* along with the name of the member who made the motion and the person who seconded the motion. The exact language of the motion should be read aloud by the clerk *prior to taking the vote on the measure* to ensure that all members understand the motion and that the clerk has correctly recorded it in the minutes.

A few councils require that the clerk tape record the entire meeting and to retain these tapes for varying lengths of time. Except as a memory aid for the clerk in preparing the draft minutes, no useful purpose is served by taping a routine council meeting or retaining any tapes beyond the time the minutes are approved and there are compelling reasons not to do so. If an audio recording of a meeting is made and the council designates the audio recording as the official record, a written record of the meeting must also be kept and shall include the same items as listed in [2-3-212, MCA](#) including a log or time stamp of each main agenda item to help the public reviewing the record find the information they need.

The clerk should provide a copy of the draft minutes to each council member for review prior to the next regular council meeting where they should be included on the agenda for possible correction and approval. Upon approval by the council, the minutes should be authenticated by the clerk's signature and filed for permanent retention.

### 2.417 Public Hearing Minutes

Because a public hearing usually involves a *quasi-judicial decision* by the council and is therefore subject to review by

a district court, a *verbatim recording should be made of all proceedings of a public hearing* conducted by the council or by a subcommittee of the council or by a hearing examiner appointed by the council pursuant to [7-1-4131, MCA](#). The tape recording must be retained so that a transcript can later be prepared *if required* for review in a judicial process. Additionally, procedural minutes should be prepared that include the items noted in Section 2.416 and a clear entry noting the time of the opening and closing of the hearing, the names of all persons testifying during the hearing and a listing of all documents and written statements presented to the council. If the hearing is continued to a certain date, that date should also be included in the minutes of a public hearing.

## **2.418 Electronic Communications**

As in virtually all aspects of life in the electronic age, the use of electronic devices has dramatically facilitated governmental communication and has just as dramatically complicated the lawful management of that communication. The means of communicating electronically will no doubt continue to evolve, as will the need for prudent use of these devices when official duties are involved. The following principles deserve careful consideration by all municipal officials:

1. Electronic mail (E-mail) received by the council concerning a public hearing must be retained as either an electronic or paper copy to the same extent as other comments are retained [2-3-301, MCA](#).
2. E-mail among the members of the council involving "substantive deliberation of agenda items" that prevents public observation violates Montana's open meetings and participation laws. Moreover, public perception of an intent to circumvent open meeting requirements when council members are e-mailing each other during the course of a council meeting damages public confidence that their municipal government is dealing with the public in an open and fair manner.
3. E-mail by a mayor or council member to other city or town officials sent or received in connection with the transaction of official duties is a public record. These communications must be retained and disposed of pursuant to the municipality's approved records disposition schedule, as detailed in Part II of this handbook.

## **Attachment 2.3 Council Rules of Procedure**

*NOTICE: this model policy developed by the MSU Local Government Center is intended as a guide for the development of City/Town Council Rules of Procedure. It should NOT be adopted prior to review by legal counsel.*

### **PART I. General Provisions**

#### **Section 1.**

These rules are supplementary to the provisions of Title 7, Chapter 1, Part 41, MCA, Title 7, Chapter 5, Parts 41 and 42, MCA and Title 2, Chapters 2 and 3, MCA, as they relate to procedures for conducting meetings and public hearings before the City/Town Council/Commission of the City/Town of \_\_\_\_\_.

#### **Section 2.**

To assure effective participation by all members of the Council and to protect the right of participation by all individuals appearing before the Council, all Council meetings and hearings shall be conducted in general conformance with "Robert's Rules of Order Revised Newly Revised, 10th Edition", except as otherwise provided by law.

#### **Section 3.**

Any member of the City/Town Council who has an interest in a matter before the Council shall not vote thereon nor seek to influence the vote of other council members. (See also Part VI, Sec.1(5) below.)

#### **Section 4.**

The Council shall choose a clerk and such other officers and employees of its own body as are necessary. The clerk, who may be the City/Town Clerk, shall be known as the Clerk of the Council and shall keep records and perform such other duties as may be required by the Council or by law.

### **PART II. Duties of the Presiding Officer**

#### **Section 1.**

The presiding officer of the Council shall be the Mayor who shall arrange the meeting agenda, coordinate the affairs of the Council and preside at all meetings of the Council.

#### **Section 2.**

In the absence or disability of the Mayor, the President of the Council shall serve as its presiding officer and may vote as other members of the council. In the absence of the Mayor and of the President of the Council, the Council shall select one of its number to serve as its temporary presiding officer.

The Clerk of the Council shall record and maintain the minutes of the Council's proceedings, showing the vote of each member upon every question, or if failing to vote, indicating that fact; shall keep records of its examinations and other official actions; shall summarize briefly and accurately the substance of all matters proposed, discussed or decided; shall record the names and addresses of all persons appearing before the Council; shall subject to the direction of the Council and presiding officer, conduct the correspondence of the Council; shall file said minutes and records in the office of the Council, which minutes and records shall be a public record; and shall be the custodian of the files and records of the Council.

### **PART III. Meetings**

#### **Section 1.**

Regular meetings of the Council shall be held on \_\_\_\_\_ of the \_\_\_\_\_ and \_\_\_\_\_ week of each month at \_\_\_\_\_ a.m./p.m. in the Council Chambers of City/Town Hall, or at such other time and place as designated by the Council.

Should the regular meeting day be a recognized holiday the Council shall, with proper notice, set an alternate day for the meeting.

#### **Section 2.**

Special meetings of the Council may be called in accordance with Sections 7---5---4102(1)(c) and 7---5---4122, MCA.

#### **Section 3.**

To ensure public participation all meetings of the Council shall be open to the public except as provided in Section 2---3---203, MCA.

#### **Section 4.**

A quorum of the Council shall consist of (enter number) Council Members. The affirmative vote of a majority of the members physically present at a lawful meeting of the Council shall be necessary to adopt or reject any motion, resolution, or ordinance or pass any measure unless a greater number is required by law.

### **PART IV. Agenda**

#### **Section 1.**

All reports, communications, ordinances, resolutions, contract documents or other matters to be submitted to the Council, shall be submitted by 12 o'clock noon on the Thursday immediately preceding the next regularly scheduled Council meeting with the exception that the Mayor/City Manager may approve late submission when deemed to be in the City's/Town's best interest by delivering the same to the Clerk of the Council, whereupon the Mayor/City Manager shall immediately arrange a list of such matters according to the order of business specified herein, and provide each member of the Council with a copy of the same not later than two working days immediately preceding the Council meeting.

Copies of the agenda shall be available to the public from the Clerk of the Council and one copy shall be posted at the designated posting board in the City/Town Hall for public viewing. Pursuant to 7---1---4135 MCA, the City/Town Council has designated by resolution its official posting place to be the posting board in the lobby (or other readily accessible public place) of City/Town Hall located at \_\_\_\_\_.

### **PART V. Order of Business**

#### **Section 1.**

The presiding officer (City Manager) shall prepare the Council agenda which shall be in substantially the following form:

1. Roll Call of the Council
2. Pledge of Allegiance

3. Approval of Minutes of the Previous Meeting
4. Public Comment on the Agenda
5. Scheduled Matters such as:
  - a. Opening of Bids
  - b. Confirmations of Appointments
  - c. Appeals.
  - d. \*Consent Items (no discussion)
    - i. General Business/Miscellaneous
    - ii. Renewal of Licenses
    - iii. Applications for Special Licenses
    - iv. Claims (Paying the Bills)
  - e. Public Hearings (required by law or ordinance)
  - f. Other Scheduled Matters
6. Public comment on any public matter not on the agenda.
7. **Unscheduled Matters:** An item that is **NOT** listed on the agenda for the current meeting may be discussed during the session at the discretion of the Council. However, the purpose of such discussion shall be to decide whether or not to schedule the item for discussion and vote on a subsequent agenda. As a general rule, no matter of significant interest to the public shall be decided by the Council without prior notice to the public as a scheduled Council agenda item.
8. Adjournment

*\*Consent items are those upon which the presiding officer considers no discussion should be necessary. However, at the beginning of each meeting any Council Member may request one or more items to be removed from the consent agenda for the purpose of discussion prior to a separate vote on the item(s). The presiding officer should schedule such discussion and vote immediately following adoption of the consent agenda.*

#### **Section 2.**

The order of business may be adjusted by consent of the Council.

### **PART VI. Rules of Council Debate**

#### **Section 1.**

Council debate shall proceed in accordance with the following rules:

1. Every member desiring to speak shall address the presiding officer and, upon recognition, shall confine himself/herself to the question under debate, avoiding abusive and indecorous language.
2. A member, once recognized, shall not be interrupted when speaking unless it is to call him to order, or as herein otherwise provided. If a member, while speaking is called to order, he/she shall cease speaking until the question of order is determined, and, if in order, he/she shall be permitted to proceed.
3. Order of rotation in matters of debate or discussion shall be at the discretion of the presiding officer.
4. A motion to reconsider any action taken by the Council, may be made only on the day such action was taken or at the next meeting of the Council. Such a motion shall be made by a member of the prevailing side but may be seconded by any member; it shall be debatable and requires a simple majority for adoption.
5. Any member of the Council who has an interest as defined by the laws of the State of Montana (Title 2, Chapter 2, MCA) or as advised by the City Attorney shall not participate in the debate nor vote in the matter nor seek to influence the vote of members of the Council. Any Council member attempting to so participate

may be censored by a majority vote of the remaining members of the City/Town Council. "Censored" is defined as a formal resolution of the legislative body reprimanding a member for specified conduct. It is an official reprimand or condemnation for improper conduct pursuant to 7-5-4103, MCA.

6. If the presiding officer of the Council has an interest in a matter pending before the Council, as defined by the laws of the State of Montana or as advised by the City Attorney, he/she shall yield the chair to a member of the Council during the course of debate and decision concerning the matter in which he/she has an interest.
7. After a motion is duly made and seconded by the Council, no person shall address the Council without first securing the permission of the presiding officer.

## **PART VII. Presentation to the Council (Other Than a Public Hearing)**

### **Section 1.**

The general manner in which items other than public hearings are handled by the Council shall be as follows:

1. The presiding officer or staff member presents the item to the Council along with a brief summary of the matter for discussion, with or without recommendation.
2. For purpose of clarification, Council Members, after recognition by the presiding officer, may direct questions to the presiding officer or staff member.
3. Upon recognition by the presiding officer, comments from the applicant will be heard by the Council.
4. After recognition by the presiding officer, Council members may direct questions to the applicant.
5. Members of the audience will be invited to present testimony beginning with those in favor of the measure, followed by those who oppose the measure and, finally, those who wish to speak but who neither favor nor oppose the measure.
6. All testimony shall be directed to the presiding officer.
7. The Council may, upon a proper motion and second, vote on the matter at hand or table the matter until a date certain.

## **PART VIII. Public Hearings**

### **Section 1.**

The Council may conduct public hearings or may appoint a committee or hearing officer for that purpose as provided in Section [7-1-4131, MCA](#). When heard by the Council the items will be presented to the Council in the same format as described in PART VII, above.

In addition, when public hearings and public interest matters are being heard and it is anticipated that a large number of citizens may wish to present testimony, the presiding officer, with the consent of the Council, may, prior to opening the hearing, establish reasonable guidelines, including reasonable time limits for presentations, for the conduct of the hearing. The presiding officer shall explain these guidelines to the audience prior to taking testimony.

### **Section 2.**

Witnesses may be required to testify under oath and all testimony shall be directed to the presiding officer.

### **Section 3.**

The Council shall not be bound by the strict rules of evidence, but may exclude irrelevant, immaterial, incompetent, or unduly repetitious testimony or evidence.

The presiding officer shall, with advice from the City Attorney, rule on all questions relating to the admissibility of testimony or evidence. The ruling of the presiding officer may be overruled by a majority vote of the Council.

**Section 4.**

The proponents or opponents, their agent or attorney, may submit petitions and letters during or prior to the closing of the hearing and the same shall be entered by reference into the minutes and considered as other testimony received at the hearing.

**Section 5.**

Following the presentation of all comments, testimony and evidence, the Council may:

1. *Continue* the hearing to a date certain to allow additional information to be submitted to the Council as a body on any unresolved issues;
2. *Close* the public hearing and proceed to Council debate of the matter; or
3. *Close the hearing and continue* the Council debate and vote to a date certain.

A public hearing which has been formally closed may not be reopened. If additional information is required before a decision can be made, the Council, upon motion duly made, seconded and passed, may call for an additional public hearing which hearing shall be duly noticed, specifying date, time, place and subject matter of the hearing.

**PART IX. Addressing the Council**

**Section 1.**

The public is invited to speak on any item under discussion by the Council after recognition by the presiding officer. The speaker should step to the lectern or front of the room and, for the record, give his/her name and address and, if applicable, the person, firm, or organization he/she represents.

Prepared statements are welcomed and should be given to the Clerk of the Council. Prepared statements that are also read, however, shall be deemed unduly repetitious. All prepared statements shall become a part of the hearing record.

**Section 2.**

While the Council is in session, the members must preserve order and decorum. A member shall not delay or interrupt the proceedings or the peace of the Council nor disturb any member while speaking or refuse to obey the orders of the Council or its presiding officer.

Any person making personal, impertinent or slanderous remarks or who shall become boisterous or disruptive during the Council meeting shall be forthwith barred from further presentation to the Council by the presiding officer, unless permission to continue is granted by a majority vote of the Council.

**PART X. Ordinances and Resolutions**

**Section 1.**

All ordinances and resolutions shall be prepared or reviewed by the City Attorney. No ordinance or resolution shall be prepared for presentation to the Council unless so ordered by a majority vote of the Council or requested by the Mayor (City Manager).

**Section 2.**

The ordinances and resolutions shall, before presentation to the Council, be approved as to form and legal sufficiency by the City Attorney and shall have been examined by the Mayor (City Manager) who may refer it for comment to the head of the department under whose jurisdiction the subject matter of the ordinance or resolution is to be

administered.

**Section 3.**

Ordinances and resolutions must be introduced by a member of the Council or the Mayor/City Manager. A draft of the proposed ordinance or resolution shall be presented to the Council for review and comment prior to a motion to approve the proposed resolution or ordinance.

If the draft *ordinance* is approved by the Mayor, it shall then be placed on the Council agenda for first reading and provisional adoption, with second reading and final adoption by the Council occurring at least twelve (12) days after the first reading and provisional adoption. After being adopted provisionally, the ordinance shall be posted on the City's/Town's posting board and copies thereof shall be made available to the public by the Clerk of the Council. The reading of the ordinance's title and number shall be sufficient to constitute a reading and an actual oral pronouncement of each word contained therein of the proposed ordinance is not required and shall be waived unless required by a majority vote of the Council.

**Section 4.**

All ordinances, except emergency ordinances, shall become effective thirty (30) days after the second reading and final adoption. All resolutions and emergency ordinances shall become effective at the time indicated therein.

**Attachment 2.4**  
**Robert's Rules of Parliamentary Procedure**  
 (Abbreviated)

To Do This	You Say This	Interrupt?	Debatable?	Amendable?	Vote Required
Adjourn the Meeting	I move that we adjourn	No	No	No	Majority
Recess the Meeting	I move that we recess until	No	No	Yes	Majority
Complain About Noise, etc.	Point of privilege	Yes	No	No	No vote: Chair decides
Suspend Consideration of a Motion	I move that we table	No	No	No	Majority
End Debate	I move the previous question	No	No	No	Majority
Postpone Consideration	I move we postpone this matter	No	Yes	Yes	Majority
Have Something Studied Further	I move we refer this to committee	No	Yes	Yes	Majority
Amend a Motion	I move that this motion be amended	No	Yes	Yes	Majority
Introduce Business (a primary motion)	I move that	No	Yes	Yes	Majority
Object to Procedure or Personal Affront	Point of order	Yes	No	No	No vote: Chair decides
Request Information	Point of information	If urgent	No	No	No vote: Chair decides
Ask for Vote by Actual Count	I call for division of the house	No	No	No	Request of One Member
To Stop Action on a Matter	I move we table	No	No	No	Majority
Reconsider a Matter Already Disposed of	I move we reconsider our action	Yes	If the original motion is debatable	No	Majority
Vote on a Ruling by the Chair	I appeal the chair's decision	Yes	No	No	Majority
Object to Considering an Improper Matter	I object to consideration of	Yes	No	No	Majority

### Attachment 2.5 Sample Voting Record for Municipal Clerks

MOTION: Raise Pay of All Staff				July 4, 2013
Council Members Name	FOR	AGAINST	ABSTAIN	NOT PRESENT
John Jones	●			
Robert Smith		●		
Thomas Burns		●		
Jack Peterson	●			
Mary Jackson			●	
Jo Green				●
Mayor Jake Brown (votes on	●			
<b>TOTALS</b>	<b>3</b>	<b>2</b>	<b>1</b>	<b>1</b>

MOTION: Raise Pay of Town Council				July 4, 2011
Council Members Name	FOR	AGAINST	ABSTAIN	NOT PRESENT
John Jones	●			
Robert Smith	●			
Thomas Burns	●			
Jack Peterson	●			
Mary Jackson	●			
Jo Green				●
Mayor Jake Brown (votes on				
<b>TOTALS</b>	<b>5</b>	<b>0</b>		<b>1</b>

MOTION: Raise Pay of City Attorney				July 4, 2011
Council Members Name	FOR	AGAINST	ABSTAIN	NOT PRESENT
John Jones		●		
Robert Smith		●		
Thomas Burns		●		
Jack Peterson		●		
Mary Jackson		●		
Jo Green				●
Mayor Jake Brown (votes on				
<b>TOTALS</b>	<b>0</b>	<b>5</b>		<b>1</b>

# CHAPTER III

## HUMAN RESOURCE MANAGEMENT

by  
John Cummings, M.B.A. and Betsy J Webb, SPHR

Edited in 2019 by Terry Mitton, Lisa Lowry, Denise  
Michael, Julia Shannon, Britani Laughery, Angela Simonson and Tara Mastel

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## 3.1 Hiring Process

### 3.101 The Hiring Sequence

Hiring a new municipal employee is an important, yet time consuming process. Before advertising, the municipality should take the time to analyze what skills, education, and experience are essential for the position. Most employers rush to replace an employee who is leaving, but a vacant position is a great opportunity to slow down, review what role the position plays, and organize the process to ensure the best fit. It is important for employers to follow the hiring policies and collective bargaining agreements they have in place. Best practices to consider in the hiring process are highlighted below and are explored in depth throughout this chapter:

- **Review the job description.** Make sure it is current and accurately reflects the combination of skills and experience necessary to do the job effectively.
- **Create a recruitment plan.** Where will the municipality advertise the position and for how long? What will the application process be (application form, resume, letter, etc.)? Who will be conducting the interviews? Will a selection committee be used?
- **Advertise the opening.** If policy allows, the municipality may advertise the position internally first, but if it does not hire internally, it will need to publicly advertise the position. See ideas for where to post the job later in this section.
- **Develop application material screening criteria.** Using the job description, develop criteria for screening application materials. The same criteria should be used for all applications and often includes minimum qualifications (education/experience), special skills or licenses, years of directly related experience, etc.
- **Screen the application.** Use the same criteria for all applications to select the most qualified individuals to invite for an interview.
- **Develop a plan for the interview.** Prepare a list of interview questions that relate directly to the job description. Decide how the municipality will evaluate the candidates who interview.
- **Schedule and conduct the interview.** Use the same set of questions for each applicant and have the same selection committee present during each of (and all) the interviews. Be sure that the selection committee understands what they can and cannot ask in an interview.
- **Skills testing.** Will the municipality be testing the candidates for basic skills such as word processing, customer service, phone skills, excel spreadsheets? If so, all applicants must be given the same skills test.
- **Check references.** References are typically checked following an interview and only for the top candidate(s). Remember to ask only for job-related information during reference checks. See best practices for conducting reference checks in this section.
- **Conduct a criminal background check.** This check is required when hiring a police officer and strongly recommended for many other positions that may involve handling cash, working with youth and more. See best practices for conducting background screens in this section.
- **Make the job offer to the successful candidate.** Remember to notify all applicants that the position has been filled.
- **Welcome the new employee to the organization.** Have her/him complete required employment paperwork (For example, the W-4 form or I-9 Proof of Authorization to work in the U.S.).

### 3.102 Job Description

A job description is a summary of the important facts and essential functions of a specific job. The Montana Municipal Interlocal Authority (MMIA) has a number of model job descriptions available upon request. In addition, contacting other similarly-sized cities and towns might provide additional examples of quality job descriptions. It is important to remember that all job descriptions must be tailored to fit the individual position. No two municipalities will have identical job descriptions.

The job description can be used directly or indirectly to assign work, clarify mission, establish performance requirements, assign titles, compensation, recruit for vacancies, explore reasonable accommodations, train employees, check for compliance with legal requirements (related to equal opportunity, equal pay, overtime eligibility, etc.) and make decisions on job restructuring. A basic job description of essential elements may include the following areas:

Section of the Job Description	Description of What the Section Should Include
<b>Job Title:</b>	
<b>Reports to:</b>	
<b>FLSA Status:</b>	(Non-exempt/exempt from overtime)
<b>Prepared by/Approved date:</b>	
<b>Position Summary:</b>	
<b>Essential Duties and Responsibilities:</b>	This category includes a thorough summary of what the job entails, including essential duties the employee must be able to perform with or without a reasonable accommodation.
<b>Qualifications/Knowledge, skills and abilities</b>	List the qualifications, knowledge, skills and abilities that are required to perform this position. Include the following statement or something like it to clarify the intent of this section:  <i>To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.</i>
<b>Education and/or Experience:</b>	List the minimum required education, years of experience or a combination of education and experience (equivalency statement). If the job could be performed without a college education, do not list a college education as a requirement for the position. Instead list the minimum combination of education and experience that prepares the applicant to be successful in the position.
<b>Physical Demands and Work Environment</b>	List minimum requirements to safely perform the essential functions of the job. Consider demands for every kind of position, not just for jobs typically associated with physical labor. Office positions may require extended hours on occasion, lifting of heavy boxes or processing large mailings. These tasks are essential to the job but physically demanding.

### 3.103 Essential Functions

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. When hiring a new employee, finalists for any position must be able to successfully perform the essential functions of the position which have been clearly defined in the job description.

Employers must be vigilant that the hiring process does not violate Title I of the Americans with Disability Act (ADA) which protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he/she has a physical or mental impairment that substantially limits a major life activity. An individual with a disability must be qualified to perform the essential functions of a specific job with or without reasonable accommodation in order to be protected by the ADA. In the State of Montana, ADA applies to any employer with an employee. See information on the ADA process in section 3.201.4 or reach out to MMIA or your city attorney for guidance.

When considering an individual for an open position, municipalities should take the following items into consideration:

- The individual must satisfy the job requirements for educational background, employment experience, skills, licenses and any other qualification standards that are job related; and the individual must be able to perform those tasks that are essential to the job, with or without reasonable accommodation.
- The ADA does not interfere with the employer's right to hire the best qualified applicant. It simply prohibits employers from discriminating against a qualified applicant because of a disability.
- Questions regarding whether or not an aspect of a job is essential and should or should not be accommodated should be researched with the city/town attorney before a decision is made.

### 3.104 Federal and State Discrimination Laws

Throughout the hiring process, municipalities need to be aware of a number of federal and state statutes that protect employees from discrimination in the workplace, including the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967. The Montana Code Annotated [Title 49 Chapters 1-4](#) outlines basic rights, illegal discrimination, the Governmental Code of Fair Practices and rights of persons with disabilities within the State of Montana.

The Montana Human Rights Act and Governmental Code of Fair Practices make it unlawful to discriminate in state and local governmental employment and services. The following are protected classes for purposes of employment in Montana:

- Age (all ages are protected from discrimination in Montana)
- Marital status
- National origin
- Physical or mental disability
- Race/color
- Religion/creed
- Sex (including pregnancy, maternity and sexual orientation)
- Political beliefs or ideas (only public employees are protected from discrimination in Montana)
- Military/Veteran status
- Genetic Information

Additional information on laws regarding employment discrimination can be found at the [Montana Department of Labor and Industry's website](#) and at the [US Equal Employment Opportunity Commission's website](#).

Municipalities may also have non-discrimination ordinances which provide for additional protected classes. Please consult with legal counsel to learn more.

### 3.105 Interviewing and Hiring People with Disabilities

The following guidelines for interviewing help ensure that persons with disabilities are afforded a fair and equitable opportunity to present their job qualifications.

- The municipality's application and interviewing procedures should comply with the Americans with Disabilities Act (ADA). The ADA prohibits disability-related questions or medical exams before a job offer is made.
- Make sure the municipality's employment offices and interviewing location(s) are accessible to applicants with mobility, visual, hearing or cognitive disabilities.
- Be willing to make appropriate and reasonable accommodations to enable a job applicant with a disability to present him or herself in the best possible light. When setting up the interview, explain what the hiring process involves and ask the individual if he or she will need reasonable accommodations for any part of the interview process (ask all applicants, not just those who have identified themselves as needing accommodations). Do not include a rehabilitation counselor, social worker or other third party in an interview unless the applicant requests it.
- Make sure all questions asked during the interview are job related and the same for each applicant. All questions must be consistent among all applicants interviewed with the exception of clarifying questions about the application, work history or a follow-up question to an answer they gave to a set question.
- In the interview, speak to the essential job functions, as well as why, how, where, when and by whom each task or operation is performed. Do not ask if the individual needs an accommodation to perform these functions, because such information is likely to reveal whether or not the individual has a disability. This is an ADA requirement to ensure that an applicant with a disability is not excluded before a job offer is made.
- If the applicant has a known disability (because it is obvious, or it was revealed by the applicant), the employer may ask an applicant to describe how they would perform a certain job function if it is an essential part of the job. In addition, in the situation of a known disability, the employer may ask the individual if he or she needs reasonable accommodations and what type(s) of accommodations.
- Concentrate on the applicant's technical and professional knowledge, skills, abilities, experiences, and interests, not on the disability.
- Disability-related questions and medical examinations are prohibited under the ADA at the pre-employment offer stage. After a job offer has been made, the offer may be conditioned on the results of disability-related questions and/or medical examinations, but only if the examination or inquiry is required for all entering employees in similar jobs and only if all medical information is kept confidential. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job. However, if the offer is withdrawn, the employer must show that the individual could not perform the essential function of the position or would pose a direct threat.
- If testing is part of the interview process, make sure the test does not reveal information about physical or mental impairments. Make sure it is not a medical examination. Other tests, which demonstrate the applicant's ability to perform actual or simulated job tasks, are permitted under the ADA. Inform all applicants before the interview that a test will be part of the interview process. Any applicant can then

request an accommodation.

- An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it is effective and would not impose an “undue hardship” on the operation of the employer’s business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and scope of the position.
- Any question or concern regarding an applicant and their actual, perceived or potential disability and any possible reasonable accommodation should be carefully researched by legal counsel before any decision is made by the municipality.

### 3.106 Veteran and Disability Preference

Applicants must claim preference and provide supporting documentation at the time they apply for the job to be offered such preference, [MCA 39-29](#) and [MCA 39-30](#). Preference is given for an applicant’s initial hire into the municipality only. Internal applicants may not claim preference. Applicants must first meet minimum qualifications prior to any preference points being offered, unless the employer is offering a training position that does not require minimum requirements to be met.

If using a selection procedure other than a scored procedure for Veteran's Preferences or Disability (non-veteran) Preference, the employer shall give preference in this order, to a disabled veteran, a person with a disability, a veteran, an eligible relative and an eligible spouse as defined in the [MCA 39-30-103](#).

#### *Veteran’s Preferences*

If using a scored applicant selection procedure, an applicant must receive the following percentage points: 5 percentage points if the applicant is a veteran OR 10 percentage points if the applicant is a disabled veteran or an eligible relative. An applicant only receives one of the above percentage points, not both. For more information on veteran’s preferences, seek guidance from the city attorney or MMIA.

#### *Disability (Non-veteran) Preference*

If a job applicant claims disability preference or eligible spouse preference, they must be hired over any other applicant with substantially equal qualification who is not a preference-eligible applicant.

Preference is typically applied at both the application screening step and the interview step.

Example of preference using the scored method:

Name	Current CDL=1 pt.	Over 2 years PW=1pt	Total Points	Preference Status	With Preference
Bill Smith	0	1	1	Disabled vet	1.10
Stephanie K	1	1	2	None	2.0
Kelly Hill	1	1	2	Vet	2.10

### 3.107 Setting Wage Rates

An accurate job description is a useful tool in analyzing employee compensation in a municipality. Some municipalities have structured pay matrices, while others may have less formal compensation guidelines. It is important to note that wages for positions may vary from municipality to municipality, but any compensation structure should be able to demonstrate equal pay for equal work and fairness in application. Labor market information regarding wage rates in

Montana is available at <https://www.onetonline.org/>. The MT League of Cities and Towns publishes a salary survey specific to Montana municipalities at <https://www.mtleague.org/surveys/>.

## 3.2 Screening Job Applicants

### 3.201 Job Applications

An appropriate job application will assist a municipality in gathering the necessary information about an applicant's ability to do the job with or without a reasonable accommodation. In addition, the job application allows a municipality to gather unbiased information to utilize in the screening of applicants.

Municipalities should not rely on job application forms available through their office supply company. These generic application forms often do not comply with Montana employment law. Job applications are available at your local job service office. Please note that municipalities can require additional materials to be submitted with the application, including resumes, transcripts, licenses, certificates and answers to supplemental questions.

In addition to the application or resume, all public employers in the State of Montana must provide a Veteran's /Disability Preference form to external applicants. Applicants who wish to claim a preference for their initial hire must return this form, along with all required documentation prior to the closing date of the announcement. An example preference form can be obtained from MMIA or your local job service office.

Below are guidelines for particularly sensitive or protected personal information that municipalities should ensure are appropriately addressed in any job application and screening process:

Personal Information about the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
<b>Age</b>	It is acceptable to require proof that the applicant is of legal working age but only after the person is offered the position. Do not include questions about the age of the applicant on the job application unless state or federal law requires a certain age—such as for a police officer to be age 18 or over.	It is not acceptable to ask for an applicant’s birth certificate. It is not acceptable to discriminate against applicants of any age.
<b>Birthplace</b>	Nothing	It is not acceptable to ask about an applicant’s birthplace.
<b>Arrest or conviction</b>	It is acceptable to inquire about convictions. Include a disclaimer on the job description that a conviction is not an automatic bar to employment.	It is not acceptable to inquire if the applicant has ever been arrested.
<b>Children</b>	It is not acceptable to ask any questions about children during the hiring process.	It is not acceptable to ask if an applicant has children, who cares for them, or if applicant has plans to have more children.
<b>Citizenship</b>	It is acceptable to ask if the applicant is legally eligible to work in the U.S. Employers cannot ask if applicants are citizens of the United States, except when hiring police officers.	It is not acceptable to ask for proof of citizenship or work permits before hire.
<b>Disability</b>	It is best not to ask any question related to any type of disability or how an applicant can do a particular and specific essential job function.	It is not acceptable to ask the applicant about their health or the health of their family which includes specific questions about disability, disease or pregnancy.

Personal Information About the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
<b>Education</b>	It is acceptable to inquire into the academic, vocational or professional education of the applicant and the schools they have attended.	It is not acceptable to require a high school diploma or other educational attainment when no relationship exists between the requirement and job performance. It is not acceptable to ask dates of attendance or dates of completion of high school education because it can reveal age.
<b>Nepotism/Family Relations</b>	It is acceptable to ask if an applicant is related to any current employee of the city/town—who and which department. This allows the municipality to avoid nepotism as defined in <a href="#">MCA 2-2-3</a> .	
<b>Social Security Number</b>	<p>It is acceptable to ask for an applicant’s social security number at the time of conducting a criminal or credit background check. Typically, this happens after a contingent offer of hire has been made.</p> <p>It is acceptable to ask the applicant to complete I-9 and W-4 on the first day of work but never before hiring.</p>	<p>It is not acceptable to ask for sensitive information until a valid reason requires it.</p> <p>Do not ask for social security number on the application.</p>
<b>Race, color, religion, sex, national origin, marital status, political belief, age, physical or mental handicap</b>	There are no questions regarding these qualities of an applicant that are acceptable to ask.	Any practice or inquiry that intentionally or unintentionally discriminates against these categories is unacceptable.

Personal Information about the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
<b>Marital Status</b>	It is not acceptable to ask any questions regarding marital status.	It is not acceptable to ask marital status, name or occupation of spouse prior to hiring.
<b>Military</b>	It is acceptable to ask if military experience contributes to the applicant's ability to perform the duties of the job for which they are applying.	It is not acceptable to inquire into general military experience or the type of discharge they had.
<b>Legal Name</b>	It is acceptable to ask if an applicant has ever worked under a different name for reference and background checking purposes.	It is not acceptable to ask original name of applicant whose name was changed by court order or otherwise.  It is not acceptable to ask the maiden name of married woman or to ask names or dates if an applicant worked under another name.
<b>Organizations</b>	It is acceptable to request information about the applicant's job-related professional organizations.	It is not acceptable to inquire about the applicant's non-work-related club or organizational memberships.
<b>Photograph</b>	It is acceptable to require a photo of the applicant for identification purposes, but only after the applicant is hired.	It is not acceptable to request photographs prior to employment.
<b>Physical Characteristics</b>	It is acceptable to explain manual labor, lifting or other requirements of the job. It is acceptable to show how the job is performed and to require a physical exam, at the employer's expense, but only after the job offer has been made	It is not acceptable to ask height or weight (except where it can be justified by business necessity).

Personal Information about the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
<b>Reference Checks</b>	It is acceptable to ask the applicant’s references about their work experience and qualifications.	It is not acceptable to request religious or personal references from the applicant.
<b>Reliability, attendance</b>	It is acceptable to ask the applicant about his or her availability to meet business needs.	It is not acceptable to inquire about family size and status or health issues.
<b>Religion</b>	It is acceptable to inform the applicant of the scheduled work week for the position.	It is not acceptable to inquire into an applicant’s religious affiliation, church, pastor or holidays observed.
<b>Sex</b>	It is acceptable to ask an applicant’s sex, only if the employer has a bona fide occupational qualification for asking, or for EEO reporting if files are kept separate from personnel forms available to those who make the hiring decisions. Seek legal counsel for guidance.	It is not acceptable to make a pre-employment inquiry which expresses any limitation, specification or discrimination about sex unless based on bona fide occupational qualification
<b>Skills Testing</b>	It is acceptable to use skills tests for selecting the best qualified applicants when the skills tests accurately reflect the required skills for the position and when all applicants are required to take the same test.	It is not acceptable to use skills tests when no direct relationship exists between the test and the requirements of the position.

### 3.202 Checklist for Reviewing Job Applications and Resumes

Once a position has been advertised and job applications and resumes have been received, it is important that the municipality carefully screen these submissions. Some key areas for municipalities to consider include but are not limited to:

- Check that the application is complete, signed and includes proper documentation, particularly if the applicant is requesting preference.
- Review the job description for the open position. Note the minimum requirements and refer to them while reviewing resumes and job applications. If an applicant does not meet the minimum requirements, they normally will not be considered further.
- Check work experience for applicability to the open position, length of time in previous positions, promotions or awards received and reason for leaving each position. Length of time in a position does not always indicate level of expertise.
- Note gaps in employment, but do not assume they were caused by negative events. It is appropriate to inquire about why gaps exist. Your application can ask applicants to explain any/all gaps in employment.
- Check educational background of all applicants for the qualifications necessary to successfully perform the job.
- Note special skills of applicants (equipment operation, certifications such as a CDL, computer software proficiency, office equipment familiarity).

In the initial pre-screening process, it is useful to develop a guideline for scoring the applications based on the job description, prior to viewing any applications. A scoring guideline or tool allows the municipality to rate applicants against its initial screening criteria and to clearly document which applicants meet the criteria for attaining an in-person interview. A scoring guideline should be maintained as per the municipality's record retention guidelines. Questions regarding any and all screening or scoring guidelines or tools should be reviewed by legal counsel.

### 3.203 Testing

Municipalities may ask applicants to undergo testing as part of the application process. Carefully developed and administered employment tests can provide organizations with a way to decide systematically and accurately which people have the ability to perform well on the job. The local job service center may be able to provide certain skills testing such as typing and computer-based tests.

The [Montana Department of Labor and Industry has some good information on employer testing of job candidates](#) on their website.

Before a municipality utilizes testing in the application process, there are several areas to consider:

- Be certain that tests are directly related to the job.
- Have a current employee try the test before it is used with applicants to ensure the task is possible in the time allotted and relevant to the posted job.
- Only use tests that are valid and do not discriminate against any group of applicants. Validity testing can be quite complex. For this reason, home-grown testing is often discouraged. Instead, consider using a vendor who has performed validity testing.
- Administer the same tests under the same conditions to all applicants for the same position.
- Accommodate people with disabilities by modifying the test or testing conditions or eliminating the testing requirement for all the applicants.
- Do not rely solely on tests for making decisions about candidates; use them as one component of the overall selection procedure.

- Any physical fitness testing required of applicants (besides police and fire) must be carefully analyzed by legal counsel to ensure it is both valid and reliable.

## 3.3 Interviewing and Checking References

### 3.301 Interviewing Candidates

At the very heart of the ability to conduct an effective job interview, is a thorough knowledge of the job duties, skills, experience and aptitude necessary to do the job well. The cost of a poor hiring decision is more than lost time and money. A poor hiring decision can cause an unqualified person to be hired which can cause low morale, decreased productivity and poor customer service among existing employees.

### 3.302 Preparing for the Interview

The typical steps to prepare for conducting an interview include the following:

1. Review rules regarding preferences above and [MCA 39-29](#) and [MCA 39-30](#).
2. Review the job description and extract 6-10 major tasks of the job. From these major tasks, identify the most important qualifications for the position and then determine how the municipality will measure those qualifications through the interviewing process. (Refer to sample rating scales for interviewing later in this section).
3. Develop interview questions (typically no more than 12 questions for an hour interview) that relate to the required knowledge, skills and abilities of the job. For example: motivation, related job experience, team player, ability to learn, technical skills, attitude, availability, flexibility, communication skills, customer service skills, supervision of staff, integrity and cooperation. Make sure that the municipality is not asking illegal or discriminatory questions. See Examples in the Chart at end of this section.
4. Develop a scoring/rating matrix to evaluate candidates based on their responses to the questions.
5. Identify panel members who will conduct the interview. Interviewing one-on-one, as opposed to using a panel may create added risk. A panel helps to limit the risk of bias affecting interview decisions. The interview panel should include the hiring manager and other staff/managers who understand the position and can commit to interviewing all candidates. If a panelist is unable to attend all scheduled interviews, then select a different panelist. Consistency of the panel is important to ensure objectivity. Block time on everyone's calendars well in advance.
6. Train panelists on the interview process. Such training can include what not to ask—discriminatory questions, how to behave professionally during the interview, the importance of making objective decisions and refraining from subjectivity/biases and how to take legible and legally defensible notes during the interview.
7. Prior to the interview, identify any problems or unique requirements with the position and develop screening tools to address these concerns. If certain aspects of the job are causing turn-over, mention them during the interview. It is better to have a person turn down the position with an accurate picture of what the position requires, than to have someone start and then quit.

General topics interviewers are not allowed to ask about during an interview
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- |  |
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| <ul style="list-style-type: none"> <li>a. Private organizations applicant belongs to</li> <li>b. Religious affiliations</li> <li>c. Native language or the manner in which a foreign language was acquired</li> <li>d. Date of birth (except when information is required for satisfying minimum age requirements)</li> <li>e. Lineage, ancestry, national origin, descent, parentage, or nationality</li> <li>f. Applicant's original name. (Unless you are inquiring about a change of name for the purposes of checking employment or education records.)</li> <li>g. Names and addresses of relatives other than a spouse and dependent children</li> <li>h. Sex or marital status</li> <li>i. Criminal arrests <ul style="list-style-type: none"> <li>i. You may ask about convictions, but not arrests.</li> </ul> </li> <li>j. Height, weight, eye or hair color</li> <li>k. Physical or mental disabilities</li> <li>l. Military armed forces history outside of the US.</li> <li>m. Never ask female applicants <ul style="list-style-type: none"> <li>i. About plans for pregnancy or childbearing</li> <li>ii. Child-care arrangements</li> </ul> </li> </ul> |
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Note: None of these questions addresses the skills needed to perform a job. However, it is permissible to ask if the applicant has any disabilities that would prevent him or her from satisfactorily performing the job.

Examples of questions interviewers are not allowed to ask
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- |   |
|---|
| <ul style="list-style-type: none"> <li>a. How many children do you have? Do you have a babysitter available if we need you on a weekend?</li> <li>b. Do you have a baby or small child at home?</li> <li>c. Are you a U.S. citizen? What country are you from?</li> <li>d. What's your native language?</li> <li>e. Have you ever been arrested?</li> <li>f. What kind of a discharge did you receive?</li> <li>g. When did you graduate?</li> <li>h. What was your maiden name?</li> <li>i. When were you born?</li> <li>j. When did you graduate from high school?</li> <li>k. What is your race?</li> <li>l. Do you have physical or mental disabilities?</li> <li>m. Would working on weekends conflict with your religion?</li> <li>n. Do you have a drug or alcohol problem?</li> </ul> |
|---|

- o. Are you taking any prescription drugs?
- p. What country are you a citizen of?
- q. What language did you speak in your home when you were growing up?

Examples of questions interviewers can ask during an interview

- a. What days can you work? What hours can you work?
- b. This position requires regular travel. Will you be able to commit this?
- c. Are you legally eligible to work in the United States?
- d. Are you over 18? (if the position requires the candidate to be 18+)
- e. This job requires someone who speaks more than one language. What languages do you speak or write fluently?
- f. Have you ever been convicted of a crime or have you ever been convicted of a felony?
- g. You say on your application that you were in the military. What kind of education and experience did you get there?
- h. Do you have a high school diploma, or did you graduate from high school?
- i. Do you have a university or college degree?
- j. Can you perform [specific tasks pertinent to the job description]?
- k. Would you be able to meet the job's requirement to frequently work weekends?
- l. Are you bondable?
- m. Tell us about your experience serving difficult customers.
- n. Give us an example of a time when you were required to learn a new task. What steps did you take to ensure you retained the information and performed it correctly?
- o. Tell us about your experience using computer software for payroll.

### 3.303 Screening/Interviewing Bias

It is human nature to have biases. Keeping those biases in check during the application screening and interviewing stages of the selection process is of utmost importance. Hiring managers and interview panel members need to take precautions to ensure such biases don't influence their judgement of the job applicants.

Screening and interviewing as a panel can help to alleviate bias. It is important for panel members to address potential bias they see and hear with other panel members during the deliberation on the candidates for the job. Focusing on the facts regarding the candidate's responses or behaviors helps avoid bias.

The following are common biases found in screening and interviewing:

**Stereotyping:** Interviewers/managers form opinions about how people of a specific gender, religion, race, appearance, neighborhood, etc. think, act, feel or would perform the job without evidence of this. Example: Assuming that a woman will want to work at a desk, rather than outside or assuming candidates who live more than 50 miles from the workplace will have attendance issues.

**First impression error:** Making a snap judgement and allowing first impression-whether it is positive or negative, to cloud the entire interview or screening process. Example: A candidate is wearing an out of the ordinary outfit, has tattoos, drives a very nice car, was the valedictorian of their school, etc.

**Halo/horn effect:** Halo effect occurs when an interviewer allows a strong point about the candidate to affect the entire process. Candidate may have started the interview off very well or submitted a perfect resume and now they can do no wrong. Errors or missing information during the interview may not be noticed or not as important. Horn effect occurs when one weak point is allowed to influence the entire process.

**Nonverbal bias:** Undue emphasis is placed on nonverbal cues, unrelated to the position. Example: style of dress, handshake or manner of speech.

**Contrast effect:** Strong candidates who interview after weak ones may appear more qualified than they actually are because of the contrast effect.

**Negative emphasis:** Rejection of a candidate based on a small amount of negative information. Research indicates interviewers given unfavorable information about a candidate give that information about two times the weight of favorable information.

**Cultural noise:** Candidates answer questions with “politically correct” answers or provides information they assume the interviewer wants to hear, rather than the truth. Example: candidate saying they have no issue reporting to a younger manager, when in fact this is not the case. It is best to use probing questions to get examples rather than asking closed questions.

**Similar to me error:** Candidates are selected based on characteristics they share with the interviewer.

### 3.304 Conducting the Interview

Basic guidelines for conducting an interview include the following:

1. In addition to asking questions of the applicant, the interviewer should give the applicant information about the job and working conditions in the organization.
2. The interviewer should watch out for interview bias.
3. The interviewer should keep the applicant from volunteering information which has no bearing on the selection process. If an applicant volunteers information about a spouse, children, religion, etc., the interviewer should stop the flow of information and politely explain that the municipality does not base its hiring practices on that particular subject area and then move the interview back to job-related questions.
4. The interviewer should prepare open-ended questions to solicit longer responses from the candidates. This is the municipality’s opportunity to get to know the candidate, what skills she/he will bring to the organization, and if the candidate will be a good fit.
5. Treat all interview candidates the same. Offer the same list of questions, have the same people present, limit the interview to about the same period of time (this may vary in length based on the candidate’s responses and how many questions they answer).

- Two sample interview rating forms are offered here. Be careful that there are no discriminatory or illegal information written in interviewer’s notes. Interviewers should keep notes that are job-related only.

Regardless of the type of form a municipality chooses to use, the rating criteria must be clearly defined. In Sample Interview Rating Form #1, it would be helpful to define what the score of 5 means. This clarification can be given in an attached key.

Sample interview rating form #2 provides “look-for” (ideal answers). These answers represent the average rating, which would be marked as a check. Any answer that is above average would receive a plus and anything less would receive a minus. A plus, check, minus system can easily be converted to a 2, 1, 0 scoring system. A three-point system helps to alleviate subjectivity in the scoring process.

**Sample Interview Rating Form # 1**

<b>Applicant Name:</b>		<b>Position applied for:</b>			
Interviewer:	Date of Interview:				
<i>Please write job---related comments regarding each interview question below and rate the applicant’s response to the interview question (1 lowest – 5 highest)</i>					
Interview Question #1	1	2	3	4	5
Comments:					

<b>Applicant Name:</b>		<b>Position applied for:</b>			
<b>Interview Question #2</b>	1	2	3	4	5
Comments:					
<b>Interview Question #3</b>	1	2	3	4	5
Comments:					
<b>Interview Question #4</b>	1	2	3	4	5
Comments:					
<b>Overall Rating</b>	1	2	3	4	5
<b>Recommended for Hire:</b>	<b>YES</b>		<b>NO</b>		<b>MAYBE</b>

## Sample Interview Rating Form #2

### *Tips for panel members:*

Remember to take legible and legally defensible notes throughout the interview. Asking follow-up/drill down questions is highly suggested to learn more about the interviewee's answer to a particular question. However, panel members must not ask questions that are not related to the pre-established questions listed below.

*+: above average answer, √ : average answer - :below average/may not have answered question*

#### **1. What helps you to be the best candidate in successfully communicating our message?**

*Look for: candidate's answer demonstrates a firm understanding of the position and/or organization. Candidate is able to successfully explain how their background directly aligns with what we are seeking in this position.*

*(+ √ -)*

#### **2. Describe a situation in which a crucial deadline was nearing, but you didn't want to compromise quality. How did you deal with it? (Decision making/problem solving)**

*Look for: candidate's answer demonstrates ability to manage work load, set priorities and solve problems on their own.*

*They did not rely heavily on the guidance of another, used a variety of tools to meet the deadline AND ensure high quality in the work.*

*(+ √ -)*

## 3.4 Reference and Background Checks

### 3.401 Checking References

Verifying dates of employment and job duties can give the municipality credible information upon which to make a hiring decision. Reference checking is normally done only on the top candidates. Some key considerations when checking references include:

- Be consistent and fair in the treatment of all applicants to avoid discrimination claims. The interviewer could check references on all applicants, only the top candidates, or only the group who made it to the interview stage.
- Some applicants may not apply if the job announcement states that the municipality will be checking references. The municipality should get permission from applicants before contacting previous or current employers by asking for a written release on the job application form.
- Prepare reference questions ahead of time and ask the same questions of all references.
- Document the information received. Also document unsuccessful tries at gathering information to protect the municipality from negligent hiring claims.
- If the reference checker cannot obtain the requested information from the references, ask the job applicant for more information or additional references with whom the interviewer may speak.
- If the reference checker is told by a reference that they are only able to verify dates of employment, ask the reference if this is a company policy that would apply to all current and past employees. If the answer is yes, accept the information they provide. If the answer is no, this may be a red flag. There may be reasons why this reference is unwilling or unable to give a reference.
- Ask factual and objective questions – don't ask for opinions.

Do not make a job offer until the municipality has completed the reference checking process. When checking

references there are a number of questions the municipality should consider asking including but not limited to the following examples:

- Employment History. Ask about positions held, dates of employment, promotions, job duties, performance, attendance records and termination or separation reasons.
- Performance. Avoid subjective appraisal information. Base responses on written evaluations. How well did the employee perform? Overall, was performance satisfactory or unsatisfactory?
- Conduct. Did the employee have an acceptable attendance record? Does your file show any documented disciplinary problems? What was the nature of the problem? What was the resolution? Was it corrected?
- Termination or separation. Why did the employee leave? Is the employee eligible for rehire? If not, why not?
- Closing. Is there anything else we should know about this applicant as it relates to his/her ability to perform the job?
- Ask the references called if they have another individual, they would recommend you talk to.

If possible, conduct interview, background and reference checks in a timely manner. Prolonging the process results in the possibility of losing a good candidate to another position.

**Sample Reference Check Form**

<b>Candidate's Name:</b>		<b>Date:</b>
<b>Position applied for:</b>		
<b>Reference's Name:</b>	<b>Phone Number:</b>	
<b>Persons Conducting Reference Check:</b>		
<p><b>Script: This is (<i>your name</i>) from (<i>city/town</i>). This candidate (<i>name</i>) has applied for (<i>title of job</i>) position and has given your name as a reference. If this is a good time for you, we'd like to ask you a few questions (<i>if not, set up a better time to do the reference check</i>). With me is (<i>other people on committee</i>), and if it's all right with you, I'll put you on speakerphone.</b></p>		
<p><b>1. Please describe the nature of your working relationship with the candidate (supervisor, coworker, subordinate, etc.).</b></p>		
<p><b>2. What were (are) the candidate's duties and responsibilities? Dates of employment? How would you describe his/her performance?</b></p>		
<p><b>3. (<i>Describe the posted position</i>). Based on the description of these duties and responsibilities, how would you describe the candidate's overall ability to perform in this position?</b></p>		

<b>4. Please rate the following areas (Check, Minus, Plus system)</b> <i>(Use the following that are relevant to the position posted or substitute other position---specific criteria.</i>			
<b>Area to be Rated</b>	<b>Score</b>	<b>Area to be Rated</b>	<b>Score</b>
Ability to prioritize and meet deadlines		Willingness to take direction or suggestions	
Verbal and written communication skills		Honesty/Integrity	
Motivation and initiative		Reliability/Dependability	
Appropriate assertiveness		Customer Service Skills	
Judgment		Team work	
Please tell us about any work habits that affected the candidate's job performance such as punctuality, attendance, sense of responsibility, professionalism, attitude, etc.			
Please describe the candidate's working relations with co-workers, the public and supervisors. Were there any particular problems experienced?			
Is there anything else you feel we should be aware of in making this hiring decision?			

### 3.402 What to do When the Municipality is Called for a Reference Check

The municipality should have a policy specifying who in the organization can give employment references and what information can be released on employees. When a reference request is received, the municipality should verify who is calling and only provide facts that are supported by the employee's personnel file. It is also good practice for the municipality to maintain records in the individual personnel files documenting who contacted the city or town for the reference, what questions were asked and that they were answered.

### 3.403 Why Conduct Background Checks on Potential Hires?

Municipalities can lose up to 2.5 times an employee's salary by failing to adequately conduct background checks on a potential hire. Those costs include direct expenses related to replacing and retraining an employee and indirect expenses such as employee violence, theft, and substance abuse. Research has shown that at least one in four job candidates is willing to falsify information to get a job including college degrees, employment history and reasons for leaving previous jobs. It is critical for public entities to validate information provided by candidates to reduce the chance of hiring the wrong employee.

### 3.404 Types of Background Checks

The most common types of background checks a municipality can perform include:

- **Reference checks** - References can be valuable in determining a potential employee's work habits and may include information from previous employers, educational institutions or personal references.
- **Motor Vehicle Record (MVR) checks** - Giving keys to a municipal car to an employee with a poor driving record can subject an employer to significant liability in the event of an accident. Negligent Entrustment occurs when the employer allows a driver to use a vehicle knowing or having reason to believe that the person creates a risk or harm to others. All states make motor vehicle records available to employers for

employment purposes.

- **Criminal background checks** - Hiring an employee with a criminal history can pose a danger to fellow employees and the public. Unfortunately, there isn't a common national database that employers can access for employee criminal histories. In general, arrest records cannot be used, and state and federal laws differ on the extent that an employer may consider an applicant's criminal history in making hiring decisions.
- **Child abuse checks (sexual and violent offenders)** - Public entity employees who will be working with children as part of their employment such as those assigned to the parks and recreation programs, protective services, daycare operations, volunteers and coaches should have their records checked for child abuse incidents.
- **Credit checks** - Credit checks, though seldom used, should be conducted on job candidates who will be working with money.

### 3.405 Model Policy for Pre-Employment Background Checks

The first step in establishing a program for pre-employment background checks is to develop a written policy with legal counsel. This policy can ensure a consistent approach is taken in the hiring process in all departments:

The policy should consider and/or cover:

- A description of the types of background investigations that will be conducted for different positions;
- The kind of information needed from the candidate, including the candidate's consent; and specification of how the background information will be used.
- The type and depth of background checks should be based on the position and job duties. For example, the background check process for a laborer in the public works department may be less intense than that for a recreation supervisor who works with children. Checking references and the driving record for the laborer may be sufficient. For the recreation department candidate, checking references, the driving record, criminal history and child abuse records will probably be necessary.
- If the employment application states that the entity plans to conduct a thorough background investigation, a candidate with a questionable background may remove himself/herself from consideration for a position. The application should send a clear message to potential job candidates that the municipality will use stringent screening and selection criteria.
- Most employers cannot have a "no felony allowed" policy for all positions. The conviction must have a direct connection to the position. For example, a conviction of theft may very likely prohibit a candidate from being selected for the Clerk/Treasurer position but may not necessarily for a lifeguard position. The [Equal Employment Opportunity Commission has information that can be of assistance when developing policy for background checks](#) on their website.
- A legal authorization form must be signed by the applicant granting the municipality permission to run criminal, driving and/or credit reports.
- Adverse action notices must be issued to any candidate that is not selected based on results from any of the above-mentioned reports. The Fair Credit Reporting Act has very strict guidelines on what this form must contain and the timeliness of its delivery. Using a third-party vendor will increase the employer's odds of following all of these federal requirements.

In addition, the employment application should include the following to support the pre-employment background investigation process:

1. A statement indicating that providing false information on the application form will be grounds for dismissal and a requirement for the applicant's signature. The "dismissal" wording should apply to

false information provided or detected during the pre-hiring process or if false information is uncovered post-hire.

2. A statement indicating that a background check will be required of all applicants prior to a job offer. An area that requests an explanation of “gaps” in the candidate’s employment history other than gaps relating to pregnancy, child care, a disability or any other protected activity.
3. Public entities should also consider including a release form with the employment application. A release form signed by the candidate authorizes the entity (or another outside organization) to conduct various types of background investigations.

### 3.406 Potential Obstacles to Conducting Background Checks

Public entities need to determine who will conduct the criminal background screen (internal or external), where to find the information, the quality of the information and how to handle the restrictions on use of the gathered information. Here are some obstacles public entities may face during the process:

**Criminal background checks** - Courts have ruled that information about prior criminal convictions are a matter of public record and can be used as a tool in the hiring process. Unfortunately, there is no nationwide repository for criminal records and the reporting of convictions varies across jurisdictions. In order to ensure the accuracy of gathered information, research may need to be done at the local, county or regional level. Laws vary from state to state on whether and how a criminal conviction may be used in the hiring process. For example, arrest records without a conviction generally can’t be used. State laws vary on the use of misdemeanor convictions. Most states don’t allow juvenile convictions to be released. Therefore, working with legal counsel to better understand state requirements in using criminal information is essential.

**Child abuse checks (sexual and violent offender check)** - Public entities that have staff members who interact with children such as those involved in recreation programs, organized sports programs and child care represent a significant potential exposure to liability. Many entities have become more aware of the importance of screening prospective workers and volunteers before they are allowed to work with children in part because of the potential high-profile liability exposure of child abuse. A public entity’s background investigation policy should include child abuse checks when the new employee will interact with youth.

**Using internal or external resources to conduct investigations** - Many arguments can be made to support either an internal background investigation or using an external source to do the investigation. There are a number of independent vendors who specialize in background investigations—everything from motor vehicle record checks to criminal histories and child abuse checks. Not all vendors operate the same way. For this reason, it is important to screen vendors prior to signing contracts for their services. MMIA can offer guidance on questions to ask and possible vendors to consider.

While many municipalities have easy access to criminal justice information via their own police department, it is not always wise to use the internal department for criminal background checks beyond those for police officer positions. The Criminal Justice Information Network (CJIN) cannot be used for background checks outside those positions that have access to or use CJIN. This limits the information an internal department can gather on an applicant, especially those who have lived outside the state of Montana.

**Legal issues** - Implementing a process to conduct criminal background investigations may sound simple enough but there are legal issues to consider including adherence to the Fair Credit Reporting Act (FCRA). Public entities need

consent from the candidate for a background check. The signed authorization on the application is not normally enough to be considered a consent form. In addition, the entity is required to inform the candidate, using a legal Adverse Action notice, if he or she is not hired based on information contained in the background investigation. The candidate has the right to contest the information.

**Federal Civil Rights Laws** - In general, these laws prohibit denial of employment solely on the basis of a prior criminal record that is unrelated to job performance. Care must be taken to weigh the offense against the requirements of the position. The hiring process should include considerations of the nature and gravity of the offense, the relationship between the incident and the type of job; the amount of time that has passed since the conviction or completion of the sentence; the applicant's efforts and success at rehabilitation and factors indicating the incident may be repeated.

**Negligent hiring liability** - Although the costs involved in hiring the wrong employee should be an impetus for public entities to conduct pre-employment background investigations, there are several other compelling reasons. Negligent hiring arises under tort law when the employer knows of a dangerous condition or propensity toward activity such as a previous criminal history or a poor driving record but hires the applicant anyway or fails to perform a reasonable background investigation. The background check process should be developed in conjunction with legal counsel and the process should be consistent across all positions. Investigation inquiries must be job-related and include implications and restrictions for using gathered information.

### 3.407 Background Check Resources

Resources available to municipalities include:

1. Montana Department of Justice, Division of Criminal Investigation, (406) 444-3625.
2. The [CONWEB service](#), provided by the Montana Department of Corrections, provides records information for convicted felons in Montana.
3. [Sexual and Violent Offender Registry](#).
4. MMIA can provide information on possible vendors.

## 3.5 Making an Offer

Once the municipality has decided to hire an individual, it needs to contact that individual as soon as possible. The municipality should be prepared to discuss salary, benefits and other job-related issues. It is common to make a contingent offer of employment until results of reference and background checks are received.

Once all background screening is complete, a firm offer of employment should be made in writing. Offer letters should include the name of the position, Fair Labor Standards Act (FLSA) status (exempt or nonexempt), wage/hour or month (do not list annual salary on letter), probationary period and benefits information. The candidate will sign to accept the offer. A signed copy of the letter should be placed into the personnel file.

### 3.501 Notice of Non-Selection

A letter, email, or a personal telephone call should be made to all applicants letting them know that they were not selected for the position. When writing a non-selection letter to external candidates, the municipality should not refer to the candidate hired or to her or his qualifications. It is important to let the applicant know that she or he had been

considered for the position, but that another more qualified candidate was selected.

### 3.502 Hiring Process Resources

Job service centers can assist with the recruitment process. [A listing of job service centers can be found at the Montana Department of Labor and Industry website.](#)

MMIA can provide assistance with interview questions, templates for rating/scoring sheets, webinars on the entire hiring process and individual consultation on the process.

Ideas for places to advertise job postings will vary based on your location, but may include:

- Job service center
- Local newspaper
- Town/City website
- Town/City Hall bulletin board
- Other locations throughout the community
- MT League of Cities and Towns website
- Local Government Center list serves
- University/college job boards
- Indeed.com; ziprecruiter.com or other job-related websites
- Linked In and other social media sites
- Craigslist
- Associations related to the position such as:
  - [International Association of Chief of Police](https://www.theiacp.org/jobs) <https://www.theiacp.org/jobs>
  - [International Association of Fire Chiefs](https://careers.iafc.org/) <https://careers.iafc.org/>
  - [Public Works Careers](https://www.publicworkscareers.com/) <https://www.publicworkscareers.com/>

## 3.6 Nepotism

Nepotism is defined by Montana Code as “the bestowal of political patronage by reason of relationship rather than of merit” [MCA 2-2-301](#). The aim of Montana’s nepotism statute is to “prevent favoritism and conflicts of interest by public agencies in hiring, and to concentrate on the applicant’s merit and qualifications.” Montana’s nepotism law covers any “person or member of any board, bureau, or commission or employee at the head of a department of this state or any political subdivision of this state” [MCA 2-2-302](#). Cities and towns are considered political subdivisions of the state. A public official may not vote on the appointment of an individual who is related to an official within the fourth degree by consanguinity (relationships by blood) or by affinity within the second degree (relationships by marriage). The following tables indicate degrees of consanguinity and affinity:

Relationship of Consanguinity				
Person	1st Degree	2nd Degree	3rd Degree*	4th Degree*
	<b>Father</b> <b>Mother</b> <b>Sons</b> <b>Daughters</b>	<b>Brothers Sisters</b> <b>Grandparents</b> <b>Grandchildren</b>	<b>Great- -</b> <b>grandparents</b> <b>Uncles*</b> <b>Aunts*</b> <b>Nephews</b> <b>Nieces</b> <b>Great-grandchildren</b>	<b>First cousins</b> <b>Great-great-grandparents</b> <b>Great uncle*</b> <b>Great aunt*</b> <b>Grandnephew</b> <b>Grandniece</b> <b>Great-great-grandchildren</b>

\* An aunt, uncle, great aunt or great uncle is related to a person by consanguinity only if he or she is the sibling of the person's parent or grandparent.

Relationship of Affinity				
Person	1st Degree	2nd Degree		
	<b>Spouse</b> <b>Father-in-law</b> <b>Mother-in-law</b> <b>Son-in-law</b> <b>Daughter-in-law</b>	<b>Stepson</b> <b>Stepdaughter</b> <b>Stepmother</b> <b>Stepfather</b>	<b>Brother-in-law</b> <b>Sister-in-law</b> <b>Spouse's grandparent</b> <b>Spouse's grandchild</b>	<b>Grandchild's spouse</b> <b>Spouse of grandparent</b>

The nepotism statutes prohibit a public official from appointing a close relative of certain public officials to a “position of public trust or emolument” [MCA 2-2-302](#). A public office is a public trust. The word “emolument...is a comprehensive term meaning the profit arising from any office or employment, whether received in the form of salary, fees or other advantage.” In summary, any question regarding nepotism in hiring, appointment, supervision and/or contracting for services should be reviewed by legal counsel as there are a few exceptions to the general prohibition.

### Sample Nepotism Policy

*No employees will be appointed in a manner inconsistent with the nepotism laws and definitions as outlined in [2-2-3, MCA](#), [ALSO INSERT LOCAL ORDINANCES IF RELEVANT].*

## 3.7 Collective Bargaining Defined

### 3.701 Collective Bargaining Defined

Many municipalities throughout Montana work with employees represented by unions. The heart of labor relations is collective bargaining. Early labor struggles centered on the right of workers to force employers to negotiate a collective agreement. Most labor agreements are negotiated uneventfully, with little public awareness, and at only a small cost to either party.

Collective bargaining basically consists of management and union representatives coming together to reach an agreement that will be acceptable to their constituents. The process can be smooth and uncomplicated if both parties are willing to negotiate cooperatively to reach an agreement. However, the process can also be complex and time consuming. The major issues surrounding collective bargaining include:

- Who will represent the workers?
- Which issues will be negotiated in the contract?
- What strategies will be used in bargaining?
- How will bargaining impasses be resolved?
- How will the contract be administered?

**Mandatory items** – Mandatory bargaining items include wages or salaries, hours of work, subcontracting, stock purchase plans, profit-sharing plans, pension and employee welfare plans, Christmas bonuses, workloads and production standards, and plant rules. Labor and management must bargain in good faith on these mandatory items, and they may bargain to an impasse without violating the unfair labor practice provisions. Unions may strike to obtain mandatory items, and employers may refuse to sign a contract unless their version of these items is included in the contract.

**Voluntary items (also known as permissive)** – Voluntary items are issues that may be discussed at the bargaining table but may not be bargained to an impasse. Employers cannot make voluntary items a condition for signing a labor contract, such as demanding that the union withdraw fines on members who crossed picket lines during a strike. Unions may not strike over voluntary items. The Supreme Court has ruled that employers may legally demand that promotions, discipline, and production scheduling be matters of exclusive management control and not subject to arbitration. This decision appears to make these items voluntary.

**The labor agreement** – A labor agreement can cover many issues or only a few. The wording of an agreement should be carefully considered so that misinterpretation leading to costly grievances may be avoided. Most labor agreements cover seven major bargaining issues: compensation and benefits, working conditions, job security, discipline procedures and individual rights, union security, management prerogatives, and contract duration.

**Good faith bargaining** – The conditions for good-faith bargaining as defined by the courts and the National Labor Relations Board (NLRB) include the following:

1. Both parties must be willing to meet at reasonable times, in reasonable places, to discuss each party's bargaining issues. A serious attempt must be made to adjust differences and to reach an acceptable common ground.

2. A counterproposal must be offered when another party's proposal is rejected. This must involve the "give and take" of an auction system.
3. A position on contract terms may not be constantly changed.
4. Evasive behavior during negotiations is not permitted.
5. There must be a willingness to incorporate oral agreements into a written contract.

### 3.702 Collective Bargaining Approaches

1. Conjunctive / Distributive Bargaining refers to an approach where "wins" and "losses" (or concessions) are the focus. [The Harvard Law School Blog has a helpful summary of this approach.](#)
2. Cooperative / Integrative / Interest Based Bargaining refers to an overall approach best characterized as win-win. The [Blaney McMurtry Law firm has a helpful summary of cooperative, integrative, or interest-based bargaining](#) on their website.

### 3.703 Unfair Labor Practices

Many of the unfair labor practice charges submitted to the NLRB arise from improper campaign activities. The NLRB has established a lengthy list of guidelines for fair elections.

1. **Interference, restraint, and coercion** - It is an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist a labor organization or to bargain collectively. Supervisors are representatives of management; therefore, they are not allowed to discriminate in the employment, tenure, or working conditions of their employees or to encourage or discourage membership in a union. Nor are they allowed to interfere with, restrain, or coerce employees in the exercise of their rights to form or join a labor union.
2. **Threats of reprisal** - Employers are free to express their views concerning union organizations provided that there is "no threat of reprisal or force or promise of benefit." This provision allows employers to tell their employees why they think unions are worthless, dangerous to the economy, or corrupt, provided that the employers avoid threats, promises, coercion, and libelous slander.
3. **Promise of benefit** - During an election campaign, employers generally are not free to grant wage increases or benefits improvements unless they can demonstrate that these changes are completely unrelated to the campaign. Such practices appear to imply an incentive to defeat the union by showing that the union is not needed to obtain better wages or benefits.
4. **Solicitation of grievances** - Employers may not solicit grievances from employees and offer to settle them informally as a way to circumvent the authority of a union. The Taft-Hartley Act allows employees to submit grievances directly to supervisors, however, without union interference. Employers may work to eliminate undesirable working conditions, but they must not do so in ways designed to persuade employees that the union is not needed.
5. **Restricting employee activity** - Employers may not restrict employees in the exercise of their rights to form, join, or assist a labor organization. Nor can an employer prevent employees from engaging in concerted activities for collective bargaining purposes or other mutual aid or protection.
6. **Surveillance and interrogation of employees** - The NLRB has ruled that an election is invalid when an employer visits employees in their homes or assembles them in a manager's office for the purpose of urging them to reject the union. Employers cannot single out certain employees and talk with them individually or in small groups, nor can an employer question employees about their union sentiments.
7. **Inciting antiunion activity** - Employers may not incite anti-union activity by paying employees to defeat a

union or campaign against it. Firms cannot recommend, circulate, or assist in preparing a petition for decertification. During a decertification campaign stage, employers can provide only minimal assistance and cannot allow employees to work for decertification during working hours.

8. **Discrimination for exercising rights** - Companies are not allowed to discriminate against employees by hiring, firing, or altering their conditions of employment in a manner designed to encourage or discourage membership in any labor union. An employer may still fire employees for disciplinary reasons, such as disobedience, drinking on the job, or careless work, but an employer should be prepared to show that employment decisions are not intended to discourage union membership or activity.
9. **Discipline/discharge for union activity** - Employers may not discharge or otherwise discriminate against an employee because the employee has filed charges or given testimony under the NLRA. Nor can an employer discipline or discharge employees for expressing profound sentiments or encouraging other employees to join a union. As a general rule, employers may not prohibit union members from wearing union insignia, buttons, or pins; unless it interferes with work performance or it could reasonably be construed to be offensive or profane.
10. **No-solicitation rules** - Employers can generally prohibit the distribution of campaign literature in work areas during work hours. However, rules prohibiting the distribution of written materials in non-work areas during non-work time are generally illegal. Non-work areas include such places as cafeterias, rest rooms, parking lots, hallways, locker rooms, and break areas.

### 3.704 Collective Bargaining Resources

1. [39-31-401, MCA, Unfair Labor Practices of a Government Employer](#)
2. [39-31-402, MCA, Unfair Labor Practices of a Labor Organization](#)
3. [National Public Employers Labor Relations Association](#)

## 3.8 Performance Evaluation

### 3. 801 Performance Evaluation Defined

A performance evaluation allows for direct communication of performance issues, identifies areas for employee development and training, and can serve as a motivating event for employees to continue excellent performance or

to enhance their performance. Feedback from the employee to the employer during an evaluation can help to identify ways to improve the organization. The performance evaluation meeting provides documentation to support other management decisions including corrective action and discipline and ensures that job/position descriptions are up to date and accurate.

### 3. 802 Conducting Performance Evaluation – Supervisor Guidelines

- Establish a positive and supportive atmosphere. Find a private, neutral place where interruptions and phone calls are unlikely. Seating arrangements for the meeting are an important consideration. Two comfortable chairs side by side at a conference table creates an atmosphere conducive to an open and honest conversation. Avoid a situation where the employer sits behind their desk as it emphasizes the power imbalance and lowers the comfort-level of the employee to share feedback about the organization

and it may reduce the employer's ability to empathize with the employee.

- Choose the right time. Look at your work schedule as well as the employee's. While mid-morning is often considered an ideal time, Fridays can be bad days if you are dealing with a marginal performer and anticipate delivering negative feedback during the meeting. If the employee receives negative feedback before a weekend, they are likely to focus on the negative feelings over the weekend rather than just getting back to work and focusing on improvement. Select a time other than lunch as the participants will be able to focus on the appraisal rather than the distraction of the meal and the server.
- Be in the right frame of mind. Don't attempt to conduct an appraisal session if you are not feeling well or if the staff person is not well. Both of you need to be in a positive frame of mind for the session.
- Make sure you are well prepared for the meeting with a plan for how the conversation will go as well as all of the necessary information at hand such as a self-appraisal by the employee if using, a calendar and peer appraisals of the employee if you are using those.
- Review the position description with the employee in advance of the evaluation with particular emphasis on the performance evaluation factors included in the description. This is a good time to determine if the duties of the job have changed.
- Evaluate each performance factor independently of all other factors.
- Emphasize good performance and be specific about any unsatisfactory performance so that it is related to behaviors rather than a personal attack of the employee. The performance evaluation should be friendly but formal and future focused.
- If unsatisfactory performance is noted, specify the expected corrective actions and set a date in the near future for follow up with set measurable goals.
- Emphasize that an unsatisfactory rating is your appraisal of job performance, not of the person. Such a rating should never be based on one event, but instead a pattern of behavior observed over the review period.
- The performance evaluation should also have an area for development of skills and expertise into the next year with measurable goals that are discussed and mutually agreed upon.
- Brief your supervisor on the strong and weak performance evaluations of those employees you supervise.
- Beware of "Halo and Horns" effect – a general impression colors the rating on all factors. Treat each factor separately.
- Beware of the "Recency" effect – incorrectly creating an evaluation that is based upon the last three or four weeks of performance rather than the totality of the evaluation period.
- Beware of "Central Tendency" – this is fence-straddling by an evaluator who is unwilling to assign appropriate high or low ratings.
- Beware of "Rater Bias" – personal prejudice against the employee.

Consider making continuous observations during the year with written notation, dating, and describing specific examples of good and poor performance. This feedback should be shared with the employee throughout the course of the year as a means to have continuous open dialogue about performance. Giving feedback only once a year during a performance evaluation is not as effective because employees tend to focus on the negative feedback and often are demoralized by the experience.

By sharing performance feedback throughout the year, hearing specific feedback about negative performance should not be a surprise for the employee. A performance evaluation should never come as a surprise.

### 3. 803 Providing Feedback – Supervisor Guidelines

Performance feedback needs to be constructive in order for it to be productive. Sometimes employees just don't measure up to the city/town's performance standards. Some managers try to avoid this experience. They hope the employee's performance will improve with time, experience, or just luck although the result is often just the opposite. Employees conclude that their performance is acceptable, and no one tells them differently until they are fired (worst case scenario). In a case like that, a successful wrongful discharge claim could be filed because appraisals didn't reflect the actual performance.

Feedback to an employee on their performance can reinforce the positive and change the negative by:

- Identifying specific actions or behaviors that were done well or poorly so the employee knows to continue on or stop doing those things.
- Explaining the effects of the observed behavior, whether positive or negative.
- Focusing the feedback on the behavior, and not the person.
- Avoiding attacks or judgments on the individual.
- Encouraging the employee to listen rather than be defensive.
- Letting the employee know what behavior is expected and how inadequate behavior should be changed.
- Taking time to point out positive behaviors that can be repeated and working with the employee to come up with ways to repeat those behaviors.
- Following up with more feedback and action plans as needed.

### 3. 804 Administration

An employee's signature on the evaluation form does not imply agreement with the evaluation, only that the employee has participated in the evaluation. Written memoranda documenting performance throughout the year should be attached to the evaluation report. Performance appraisals should be signed by the supervisor. The signed report and the employee's comments and other documents must be filed in the employee's personnel folder and stored in a secure place not readily accessible by employees. The personnel file should be made available to the employee upon request but under controlled circumstances to prevent loss of critical documentation.

### 3. 805 Performance Evaluation Resources

Montana Municipal Interlocal Authority (MMIA) can provide resources to help municipalities with performance evaluations.

If the municipalities policy states an evaluation will be conducted annually, then the city/town must adhere to this policy. If there is concern about this being conducted, the city/town may want to consider revising the policy to state "will normally be conducted on an annual basis" or "may be conducted on an annual basis". Consulting with MMIA and the City/Town attorney is important when revising any policy.

## Sample Performance Evaluation Policy

*Employee performance evaluations are provided at least annually to non-probationary employees. The evaluations recognize employee strengths and special abilities, report progress and allow correction of any deficiencies, as well as provide an opportunity to discuss areas that need improvement. Annual appraisals and evaluations should provide an ongoing performance record. This may be used as a supportive document for personnel actions such as promotions or demotions. They also provide employees an opportunity to discuss personal goals, [CITY/TOWN] goals and means for improvement. Annual evaluations provide an opportune time to formulate or update the employees' job descriptions.*

*Probationary employees will receive informal feedback throughout their probationary period. The supervisor or the [MAYOR/CITY MANAGER] and/or their designee will formally evaluate the probationary employee at the end of the probationary period or as soon as is feasible, at which time the employee will be advised of his or her status (regular or terminated.)*

*The employee's immediate supervisor or the [MAYOR/CITY MANAGER] and/or their designee will complete the evaluation using their job description and the [CITY/TOWN] personnel policy manual as the appraisal basis. The employee is encouraged to complete a preliminary self-appraisal to prepare for the evaluation meeting. The employee and the evaluator shall schedule a conference to discuss the employee's job performance and the job description. The conference will provide the opportunity for the employee to work with their supervisor or the [MAYOR/CITY MANAGER] and/or their designee to develop the employee's understanding of the position, annual goals, training needs, budget restraints/needs and improvement plan. If the employee, their supervisor or the [MAYOR/CITY MANAGER] and/or their designee do not agree on an evaluation result, the employee may respond in writing within 10 working days and attach the statement to the performance evaluation form.*

*The employee, their supervisor or the [MAYOR/CITY MANAGER] and/or their designee will sign and date the evaluation form. If the employee refuses to sign the evaluation form, documentation of their refusal will be added to their evaluation. The employee's signature will indicate that the employee has reviewed the evaluation with their supervisor or the [MAYOR/CITY MANAGER] and/or their designee and understands the comments contained within the evaluation.*

### 3. 806 Performance evaluation forms

Performance evaluations can be as simple as a written summary of successes and challenges for the year, to more complex computerized systems that gather feedback from co-workers, weigh certain competencies and tie performance to compensation. Cities and towns should choose a format that works well for their needs. Regardless of the form selected, it is important that it ties directly to the work of the position, that criteria for each rating level is clearly defined, that employees know what they are being evaluated on prior to the evaluation period beginning and that justification can be given for any rating level.

## Sample Performance Evaluation Tool #1

Employee:		Position:	
Supervisor:		Department:	
Date of Evaluation:		Start date in position:	
SECTION I --- GENERAL PERFORMANCE STANDARDS <i>Consider each standard separately. Mark an X in the appropriate box which most reflects the evaluator's response. A substandard performance rating on any performance standard must be supported by specific comment in the space provided. Use additional sheets if necessary.</i>			
1. <b>JOB KNOWLEDGE, SKILLS, AND ABILITIES:</b> The employee demonstrates the knowledge, skills and abilities necessary to perform work satisfactorily.			
<input type="checkbox"/> Does not have the basic knowledge, skills and abilities to perform work satisfactorily.	<input type="checkbox"/> Has the basic knowledge, skills, and abilities to perform work satisfactorily.	<input type="checkbox"/> Has exceptional knowledge, skills, and abilities to perform work.	
COMMENTS:			
2. <b>QUALITY OF WORK:</b> The employee demonstrates accuracy, attention to detail and effectiveness in completion of work.			
<input type="checkbox"/> Work is sometimes inaccurate or incomplete; fails to meet departmental standards.	<input type="checkbox"/> Work is usually accurate and thorough; work meets departmental standards.	<input type="checkbox"/> Work is consistently of excellent quality, accuracy, and detail.	
COMMENTS:			

3. **PRODUCTIVITY: Employee performs work with efficiency, consistency and timeliness.**

<input type="checkbox"/> Works slower than expected; <input type="checkbox"/> Work is of substandard consistency and timeliness.	<input type="checkbox"/> Completes work on time, with consistency and efficiency; <input type="checkbox"/> Meets departmental standards.	<input type="checkbox"/> Quickly completes work, often ahead of schedule; effectively prioritizes works; exceeds departmental standards.
COMMENTS:		

4. **RELIABILITY:** The employee exhibits dependability and conscientiousness in performing work and in willingness to accept responsibilities.

- |  |   |   |
|--|---|---|
| <input type="checkbox"/> Sometimes is not dependable and conscientious in performing work;<br><input type="checkbox"/> Unwilling to accept responsibilities. | <input type="checkbox"/> Consistently dependable and conscientious; usually accepts responsibilities; meets departmental standards. | <input type="checkbox"/> Extremely dependable; follows through promptly on all tasks; accepts responsibilities; exceeds job goals; show high level of initiative. |
|--|---|---|

COMMENTS:

5. **COMMUNICATION:** The employee demonstrates the appropriate level of written and verbal communication skills necessary to satisfactorily perform the job.

- |  |  |   |
|--|--|---|
| <input type="checkbox"/> Communication skills impair work performance. | <input type="checkbox"/> Possesses the required communication skills and is effective in the position; meets departmental standards. | <input type="checkbox"/> Has excellent communication skills; very effective in verbal and written interactions. |
|--|--|---|

COMMENTS:

5. **WORK RELATIONSHIPS:** The employee possesses the ability to maintain effective and productive working relationships with fellow employees, supervisors and the public.

- |   |  |   |
|---|--|---|
| <input type="checkbox"/> Has trouble getting along with other employees, supervisors, and the public. | <input type="checkbox"/> Has a generally positive approach in assisting others; maintains effective working relationships; meets departmental standards. | <input type="checkbox"/> Exceeds departmental standards; highly cooperative; works hard to promote positive work relationships. |
|---|--|---|

COMMENTS:

7. **SAFETY:** The employee adheres to the rules and regulations to ensure safety standards are met.

Fails to follow safety rules and regulations; falls below departmental

Follows safety rules and meets departmental standards.

Exceeds departmental standards for safety.

COMMENTS:

**SECTION II: OVERALL WORK PERFORMANCE:** *Check the standard which matches the employee's OVERALL work performance. An overall work performance rating which does not meet "Job Requirements" requires specific explanation in the comment section. Explanation must include the specific job performance areas requiring improvement. Attach additional sheets as necessary.*

Performance needs improvement to meet Job Requirements.

Performance meets Job Requirements

Performance exceeds Job Requirements.

COMMENTS:

**SECTION III -- EMPLOYEE COMMENTS:** *Comments are encouraged either agreeing, disagreeing or acknowledging the supervisor's evaluation. Attach additional information if needed.*

Supervisor's signature:

Date:

Employee's signature:

Date:

Chief Administrator's signature:

Date:

NOTE: By signing this form, the employee acknowledges only that this evaluation was discussed, and a copy has been received by the employee. The employee's signature does not signify agreement with the evaluation.

**Sample Performance Evaluation Tool #2**

<b>Section A</b>
<b>Employee Information- Name</b>
<b>Employee ID</b>
<b>Job Title</b>
<b>Date</b>
<b>Department</b>
<b>Supervisor</b>
<b>Review Period</b>
Using the checklist, the supervisor should place either an <b>S (Satisfactory)</b> or <b>N (Needs Improvement)</b> or <b>O (Other)</b> or <b>NA (Not Applicable)</b> in each of the sub-category boxes confirming they have discussed each of the performance criteria with the employee. Articulate how the employee has performed during the evaluation period in each of the categories. <i>Any category marked with an "N" or "O" will require an explanation below in Section C.</i>
<b>Section B</b>
<b>Supervisor</b>
<b>WORK HABITS:</b>
Dependability/ Attendance/ Punctuality:
Safety & Housekeeping:
Initiative/ Versatility/ Adaptability:
Personal Appearance:
Compliance with Policies & Procedures:
<b>JOB KNOWLEDGE, SKILLS &amp; ABILITIES KSA'S &amp; QUALITY &amp; QUANTITY (PRODUCTIVITY) OF WORK:</b>
Job Knowledge, Skills & Abilities (KSA's):
Quality of Work:
Quantity (productivity) of work:
<b>INTERPERSONAL SKILLS:</b>
Interpersonal Skills:
Work Relationships (teamwork):
Communication Skills:
<b>LEADERSHIP, JUDGEMENT AND STRESS TOLERANCE:</b>
Leadership:

Judgement:

Stress Tolerance:

**BUDGET &/OR FINANCIAL RESPONSIBILITY:**

Budget &/or Financial Responsibility

**Section C**

**"Other/ Needs Improvement' & Overall Impression of Employee Performance**

**Section D**

**Goals & Objectives**

1. Did the employee meet their goals and strategic objectives established for the previous year?
2. Agreed upon goals, training and objectives for upcoming year.
3. What suggested areas of improvement (Training & Development) are required?

**MANAGEMENT & SUPERVISION:**

Decision making & problem solving:

Planning, organization & delegation of resources:

Performance management:

**Section E**

**Verification of Review-**

*By signing this form, you confirm that you have discussed this review in detail with your supervisor. Signing this form does not necessarily indicate that you agree with this evaluation.*

**Employee Signature:**

**Date:**

**Supervisor's Signature:**

**Date:**

**Employee Self- Evaluation Form**

PART I – IDENTIFICATION	
<b>Name:</b>	<b>Title:</b>
PART II – INSTRUCTIONS	
<p><b>Please complete the following self-evaluation form by responding to the questions listed in each section as appropriate, as well as providing any additional information you wish to share that is not specifically addressed below.</b></p> <p><b>This self-evaluation will be used by your supervisor as part of your annual review to evaluate your performance in some or all of the following areas: Knowledge, Dependability, Communication, Interpersonal Skills, Independent Action (or initiative), Professional Development, Leadership, Supervisory Skills, and Teamwork. Please address these areas of performance as appropriate in your responses below. Submit a copy of your self-evaluation to your supervisor prior to your annual review. A copy of your self-evaluation and performance evaluation will be kept in your personnel file. You will be provided with a copy of your performance evaluation.</b></p> <p><b>This self-evaluation form is based on the following four areas: (1) positive areas of job performance, (2) areas that need improvement, (3) feedback for supervisor or department in general, and (4) goals for next year. The goals you set for next year will be part of your next annual review.</b></p>	
PART III – RESPONSE	
<p><b>POSITIVE AREAS OF JOB PERFORMANCE Summarize your accomplishments this year. What do you like most about your job? What parts of your job do you feel strongest in? What were some of your “successes” this past year?</b></p>	
Response:	
<p><b>AREAS THAT NEED IMPROVEMENT What do you like least about your job? What parts of your job do you feel less confident about? What frustrates you or has made meeting goals difficult? What were some of your “challenges” this past year?</b></p>	
Response:	
<p><b>FEEDBACK FOR SUPERVISOR OR DEPARTMENT IN GENERAL Is your current level of supervision meeting your needs? How could it be better? How well is teamwork going for you? What do you still need to learn? What resources would help you do a better job? Do you have any ideas for the department to consider?</b></p>	
Response:	
<p><b>TRAINING ATTENDED THIS YEAR</b></p>	

Response:

**GOALS FOR NEXT YEAR** What are the major points of focus for you in the next 12 months? In what areas are you interested in developing new expertise?

Response:

## 3.9 Progressive Discipline

One of the most difficult aspects of managing a municipality is the occasional need to discipline and/or terminate an employee. In order to better understand this process, it is important to understand the concepts of probationary period, progressive discipline, wrongful discharge and constructive discharge.

### 3.901 Probationary Period

Montana is a unique state in that it does not have what is commonly referred to as “employment at will”. Employment at will means an employee can be discharged at nearly any time with or without cause. In Montana, the only time an employee may be terminated *without cause* is during her or his probationary period. Cities and Towns should develop a probationary period policy that sets this initial probationary period at any length up to a maximum of one year. If the probationary period is not stated, Montana law defaults to a six-month probationary period (39-2-904 MCA). Public Safety officers typically serve 1-year probationary periods.

Municipal policy sets the probationary period and it must be followed for all staff. Employees may only serve one probationary period. It is common for an employee who is transferred to a new position to serve a trial period which is typically 30 to 90 days. A trial period is different from a probationary period. A trial period is used when an employee who has already served a probationary period is transferred to a new position in which the employer wishes to “test” them out. If such an employee were not to successfully complete a trial period, they would normally be placed back into their prior position or a similar position.

#### Sample Probationary Period Policy

*All employees will serve a [INSERT TIME] month probationary period. [PROBATIONARY PERIODS FOR POLICE/FIRE WILL DIFFER—list what their probationary period is]. The probationary period allows time for the employee to learn the position as well as time for the supervisor to evaluate an employee’s potential and performance. During the established probationary period, [CITY/TOWN] reserves the right to terminate an employee with or without cause. An evaluation will be completed prior to completion of the period to notify the employee of their status (regular, terminated or extended probation when applicable).*

### 3.902 Union Representation

Different employees may have different disciplinary processes/steps/procedures if they are covered by a collective

bargaining agreement and may need to be disciplined in different ways. Municipalities should be aware of, and utilize, the disciplinary steps provided in the collective bargaining agreements.

If employees covered under a collective bargaining agreement believe that meeting with a supervisor or being questioned during an investigation may result in disciplinary action against them, they have the right to have a union representative at the meeting. Employees should be afforded a reasonable time to obtain a representative if they would like to have one at a meeting. This right is called the Weingarten Rule. It is recommended that management have a witness in the room.

Employees should also be advised that failure to cooperate in an investigation when being compelled to do so could result in discipline up to and including termination.

### **3.903 Progressive Discipline**

Progressive discipline is the process of using increasingly severe steps or measures when an employee fails to correct a problem after being given a reasonable opportunity to do so. The underlying principle of progressive discipline is to use the least severe action that is necessary to correct the undesirable situation. Increase the severity of the action only if the condition is not corrected. Not all disciplinary policies are progressive in nature. Many municipality policies allow the manager to determine the proper level of discipline based on the violation and past practice. Reference the applicable municipal discipline policy to learn specifics of the municipality's requirements for disciplining employees.

Some guidelines to consider regarding disciplinary action are:

- Thoroughly investigate the situation which includes obtaining the employee's explanation or response prior to administering discipline.
- Document the process and results of your investigation.
- It is acceptable to repeat a step if you feel that it will correct the problem. This may be the case if some time has passed since it was last necessary to address the issue and the situation has only recently reappeared.
- Be aware that an employee may be led to believe that nothing worse will happen if you continually repeat a step.
- The goal is to modify the unacceptable behavior to improve the performance. The goal is not to punish the employee but to more clearly communicate with the employee of the need to correct the problem.
- There is no rigid set of steps nor is there an inflexible rule that all steps must be followed before terminating an employee. In most instances, discipline will be used in progressively escalating steps that eventually lead to termination.
- Early, less stringent, measures could possibly be skipped for more serious offenses such as theft, fighting, drug or alcohol use or sale.
- All steps are typically used for attendance or general work performance problems.
- Though not required, it is strongly encouraged and considered best practice to have a witness or note taker present when meeting with the employee during the progressive discipline process. Your witness/note taker should never be a peer of the employee. Most cities or towns permit the employee to have a witness at such meetings if he or she wishes.
- Utilize the Employee Assistance Program (EAP), that is typically part of the employee benefits package to assist with disciplinary matters. Managers can mandate EAP services when coaching and disciplining staff.
- All steps of corrective coaching should normally be done prior to entering into formal disciplinary action.

- Your City/Town mayor/manager is normally the final decision maker for termination and often for other forms of disciplinary action. Refer to your policy for guidance.
- Your city attorney should be consulted when termination is the step being taken.
- Employees should always have access to the grievance process if they feel discipline is unwarranted.

### 3.904 Essential Elements of Each Progressive Discipline Step

Disciplinary actions are often overturned completely or reduced to a lesser level when any of the essential elements of progressive discipline are missing. Essential elements to be considered include:

- Explicitly inform the employee of the unacceptable behavior or performance using specific work-related examples. One must not assume that the employee knows what the problem is, rather, the problem must be fully explained with a solution given.
- Explain acceptable behavior or performance standards using examples and set a reasonable time for the employee to comply.
- Inform the employee of the consequences of failing to comply. This is not a threat, rather it gives the employee reasonable expectations of the consequences if change does not occur.
- Specify exactly which step of the municipality's progressive discipline policy the employee is currently in.

Sample Corrective Action Steps Include:

#### 1. Verbal warning

- Conduct the oral warning session as the initial step in a "low-key" manner. Be friendly, yet firm.
- Tell the employee the purpose for the discussion. Identify the problem.
- Have documentation available to serve as a basis for the discussion. Such documentation should include written description of behavior being addressed and the municipal policies that are allegedly being violated.
- Seek input from the employee about the cause of the problem.
- Clarify that the employee understands expectations concerning the situation by asking the employee to state in their own words the preferred behaviors.
- Inform the employee that additional disciplinary action may follow if the problem persists.
- Try to get a commitment from the employee to resolve the problem.
- Schedule a follow-up meeting date with the employee to review changes in behavior. At this meeting, provide feedback to the employee on how she or he is progressing on solving the problem.
- This step may be repeated with stronger consequence statements. Examples range from a statement that failure to correct this situation "may lead to further disciplinary action" to a statement that "this is a final warning and failure to correct the problem will lead to discharge."
- Document the verbal conversation with the employee in the form of a memo, have the employee sign the documentation and place a copy in the employee's personnel file.

#### 2. Written warning

- A written warning is the next step in the progressive discipline following a verbal warning and follow-up. The written warning is warranted when the employee has received the verbal warning, but the behavior has not changed.
- The written warning should include:
  - A statement about the past, reviewing the employee's history with respect to the problem. Make sure the statement focuses on observable behaviors rather than general statements that are difficult to document or prove such as attitudes or feelings. Refrain from any personal judgements.

- A statement about the present, describing the who, what, when, etc. of the current situation, including the employee's explanation.
- A statement of the future, describing your expectations and the consequences of continued failure.
- The warning should be addressed to the employee.
- This step may be repeated with stronger consequence statements. Examples range from a statement that failure to correct this situation "may lead to further disciplinary action" to a statement that "this is a final warning and failure to correct the problem will lead to discharge."
- Have the employee sign the written warning to acknowledge that they have received the document. Place a copy in the employee's personnel file.
- If the employee refuses to sign the document, have a witness in the room and then clarify verbally, "am I understanding correctly, that you are refusing to sign the receipt of this document?" If they answer yes, with a witness in the room, write, "employee name refuses to sign this document" sign your name, have the witness sign their name and then make a copy for the employee before filing the document in the personnel file.

### 3. Suspension with or without pay

- The length of the suspension is not as critical as the step of suspension. One to three days emphasizes the seriousness of the situation.
- Under the Fair Labor Standards Act, exempt/salaried employees must be suspended in week long (40 hour) blocks of time.
- The written record of the suspension is prepared after discussion with the employee. It specifies the start and end dates, emphasizes that it is a final warning, states the reason, and is given to the employee at the start of the suspension so that the reasons for not working are clearly understood.
- Document the discipline in writing, have the employee sign that they received the document, and place a copy in the employee's personnel file.
- If the employee refuses to sign the document, have a witness in the room and then clarify verbally, "am I understanding correctly, that you are refusing to sign the receipt of this document?" If they answer yes, with a witness in the room, write, "employee name refuses to sign this document" sign your name, have the witness sign their name and then make a copy for the employee before filing the document in the personnel file.
- [MCA 7-33-4123](#) and [4124](#) address suspension of municipal fire fighters. If a fire fighter is suspended from duty, they may request that the charges be presented to the City Council/Commission for a hearing. This right is separate from any grievance process. It is important to seek guidance from the City/Town attorney in how to handle such circumstances.

### 4. Termination

- This is the last step of any progressive discipline system and is used when earlier steps have not produced the needed results.
- Inform the employee about the nature of the problem. See sequence described under an oral warning and written warning.
- Clearly document the nature of the problem in the written termination letter and (where appropriate) list the previous steps of progressive discipline that were utilized leading up to the termination.
- Have the employee sign a copy of the termination letter and place a copy in the employee's personnel file.
- If the employee refuses to sign the document, have a witness in the room and then clarify verbally, "am I understanding correctly, that you are refusing to sign the receipt of this document?" If they answer yes,

with a witness in the room, write, “employee name refuses to sign this document” sign your name, have the witness sign their name and then make a copy for the employee before filing the document in the personnel file.

- The termination letter should specify that the municipality has a grievance process and the employee has the right to utilize the grievance process.
- Attach a copy of the grievance process to the termination letter.

### **3.905 Due Process Required**

Due process, within the context of corrective action, is essentially a process that involves management, HR and the employee for whom corrective action is being considered. Specifically, due process can be viewed as a process by which:

1. The performance and behavior standard have been established and communicated to the employee and documentation of that communication exists.
2. The performance or behavior discrepancy has been identified and persuasive evidence of the employee’s culpability or negligence has been obtained.
3. The employee is informed that his performance and/or behavior do not meet standards.
4. The employee is given an opportunity to present his viewpoint. Often referred to as a “what say you” meeting.
5. Corrective action is imposed that is fair and consistent with other similarly situated employees.
6. Communication of expected standards is repeated.
7. The consequences of failing to meet expected standards are communicated.
8. Appropriate action is taken if standards continue to not be met.

If the investigation may lead to criminal charges and the employee is compelled to participate in the employment investigation, the findings are not admissible against them in a criminal matter. This is the Garrity Rule. Employees **MUST** be given a Garrity Notice to sign prior to participating in any investigation that involves a potential criminal matter. *Consultation with the City/Town attorney is important when it comes to these matters.*

## Sample Progressive Disciplinary Policy

*Upon suspected violation of federal, state or local laws, (CITY/TOWN) rules and/or regulations, employee conduct/ behavior/ performance standards, or (CITY/TOWN) policies, the employee may be subject to disciplinary action. The supervisor of the employee in question shall notify the (MAYOR/CITY MANAGER) and/or their designee. The (MAYOR/CITY MANAGER) and/or their designee will task the supervisor and/or the Clerk/Personnel Director to fully investigate and document situations that may require disciplinary action.*

*Employees may be placed on administrative leave (with or without pay) pending investigation. The employee will be interviewed during the investigation process. Prior to the investigation review, the (MAYOR/CITY MANAGER) and/or their designee will inform the employee of the suspected violation and in general terms what the interview will be regarding.*

*(The supervisor, (MAYOR/CITY MANAGER) and/or their designee, as well as the employee, may request an attendee to accompany them in the interview, if desired. The attendee, however, will be permitted for observation only and will not be permitted to participate in the interview.)*

*The supervisor, the employee being investigated, the Clerk/Personnel Director (if it is determined that they should attend) and the (MAYOR/CITY MANAGER) and /or their designee will meet and conduct the interview. The employee being interviewed may request an attendee of their choosing to e present at the interview; however, they will be permitted for observation only and will not be permitted to participate in the interview.*

*Upon conclusion of the investigation, it will be decided whether or not discipline needs to occur. The (MAYOR/CITY MANAGER) and /or their designee shall inform the employee of the results of the investigation. If deemed necessary, the Clerk/Personnel Director shall be present to document the hearing. During the hearing, the employee will be able to respond to the findings of the investigation.*

*Upon completion of the hearing, the (MAYOR/CITY MANAGER) and/or their designee will write a letter to the employee documenting the investigation and noting the hearing process has been completed, stating the findings and declaring the appropriate form of discipline as determined by the (CITY/TOWN).*

*If the employee doesn't agree that the discipline was warranted or if they consider the disciplinary action inappropriate, the employee may follow the grievance procedure. Appropriate discipline, as determined by the (CITY/TOWN), will be rendered in one of the following forms:*

### **1. Oral reprimand**

*The (MAYOR/CITY MANAGER) and/or their designee will meet with the employee and explain the problem as well as the necessary action required to correct the problem. The (MAYOR/CITY MANAGER) and/or their designee will also outline the time period in which the employee must correct the problem and the consequences should the employee not conform or comply with the necessary action. The (MAYOR/CITY MANAGER) and/or their designee will summarize the conversation with the employee in writing to document the disciplinary procedure as an oral reprimand. The employee and the (MAYOR/CITY MANAGER) and/or their designee will sign the summary which attests that the meeting took place, that the employee understood the problem and the corrective action required. The summary will be placed in the employee's personnel file.*

**2. Written reprimand**

The (MAYOR/CITY MANAGER) and/or their designee will document the problem in a letter to the employee. The (MAYOR/CITY MANAGER) and/or their designee will meet with the employee, present the letter, and explain the problem. During the meeting the (MAYOR/CITY MANAGER) and/or their designee will clarify the necessary corrective action, the time period to conform or comply with the corrective action, and the consequences should the employee not satisfactorily complete the necessary action. The letter to the employee will clarify that the employee is receiving a written reprimand as the disciplinary procedure. A copy of the letter must be signed by the employee that attests the employee participated in the meeting, understood the problem and the corrective action required, and received the written reprimand.

**3. Suspension (with or without pay)**

The (MAYOR/CITY MANAGER) and/or their designee will document the problem in a letter to the employee and indicate whether the employee is being suspended with or without pay. The (MAYOR/CITY MANAGER) and/or their designee will meet with the employee, present the letter, explain the problem and inform the employee of the severity of the discipline received. During the meeting the (MAYOR/CITY MANAGER) and/or their designee will clarify the necessary corrective action, the time period to conform or comply with the corrective action, and the consequences should the employee not do the necessary action. The letter to the employee will clarify the effective dates of the suspension (with or without pay) and the date and work schedule and the date that the employee is to return to work. A copy of the letter must be signed by the employee that attests the employee participated in the meeting, understood the problem and the corrective action required, and that the form of discipline was suspension (with or without pay).

**4. Demotion- loss of duty**

The (MAYOR/CITY MANGER) and/or their designee will document the problem in a letter to the employee and indicate the specific conditions of the demotion to include modified job duties and compensation, as warranted. The (MAYOR/CITY MANGER) and/or their designee will meet with the employee, present the letter, explain the problem and inform the employee of the severity of the discipline received. During the meeting, the (MAYOR/CITY MANAGER) and/or their designee will clarify the necessary corrective action, the time period to conform or comply with the corrective action and the consequences should the employee not do the necessary action. The (MAYOR/CITY MANAGER) and/or their designee will determine if the demotion is a temporary disciplinary measure or a permanent job modification. In the event the demotion is a permanent job modification, the employee's job description will be updated to reflect such. A copy of the letter must be signed by the employee that attests the employee participated in the meeting, understood the problem and the corrective action required and that the form of discipline was a temporary or permanent demotion and loss of job duties/responsibilities. If the employee's job description was updated, the employee must sign the updated job description to reflect that the employee has had the modified duties communicated to the employee.

**5. Termination**

If the appropriate disciplinary action is termination, a letter to the employee will document the problem and summarize the results of the investigation and hearing. The letter will detail the effective cause and date of discharge. The letter shall also include a copy of the Grievance Procedure Policies advising the employee of their right to use the procedures and to have the termination reviewed by the appropriate municipal authority.

### 3.906 The Montana Wrongful Discharge from Employment Act

Montana's wrongful discharge statute provides the following:

1. An employee can be discharged only for good cause after completing the employer's probationary period; however, during an employee's probationary period, employment may be terminated for any reason considered sufficient by the terminating party;
2. Employers that have written personnel policies must follow those policies in making a discharge;
3. An employee who wins a wrongful discharge suit may collect lost wages and fringe benefits for a period of up to four years from the date of discharge; and
4. Arbitration is encouraged to save the expense of lawsuits, and an employer may benefit if it offers arbitration to a discharged employee. Arbitration is not typically used for non-unionized employees. If arbitration is to be used, it must be stated as such in the grievance policy and be understood that it is final and binding.

A discharged employee must be notified of the internal grievance policy and be given a copy of the policy, within 7 days of termination and exhaust the grievance process, prior to filing a Wrongful Discharge from Employment claim. If an employer fails to provide a copy of the grievance policy within 7 days, the terminated employee need not exhaust their internal grievance process prior to filing a claim.

The Wrongful Discharge from Employment Act does not apply to unionized or contracted employees. For unionized employees, the grievance process found in the collective-bargaining agreement is the exclusive remedy for a wrongful discharge.

By enacting this statute, Montana has *eliminated employment-at-will* as to discharges, since an employee can no longer be terminated merely at the will of the employer. Wrongful discharge will exist in three types of situations:

1. If the discharge is in retaliation for refusing to violate public policy or reporting a violation by the employer;
2. If the discharge is not for good cause and the employee has completed the probationary period;
3. If the discharge involved an employer's violation of its own written personnel policies.

The good cause requirement for discharges means that employers must be prepared to document all terminations. Good cause is defined as reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason, [MCA 39-2-9](#).

### 3.907 Constructive Discharge

Constructive discharge occurs when employees are forced or coerced into quitting, rather than voluntarily choosing to terminate the employment relationship. This can happen when an employer does not wish to go through the standard process of progressive discipline and attempts to force an employee to quit or resign their position.

When alleging constructive discharge, employees may claim that the resignation was the result of the employer's actions or the employer's failure to correct an intolerable work environment. For example, an employee who is victimized by a supervisor's constant sexual harassment may feel compelled to quit. The employee's leaving under such circumstances may be a constructive discharge.

Other than harassment, employees may be constructively discharged due to any of the following:

- Discrimination
- Dangerous duties
- Hazardous situations
- Demeaning or malicious assignments
- Employer's repeated and extensive failure to provide employee with work

### **3.908 Legal Standards**

In order to sue successfully on the basis of constructive discharge, an employee must prove in court that the working conditions he or she experienced were intolerable. In addition, the employee must prove that the employer either created the intolerable conditions intentionally or allowed them to exist.

## **3.10 Grievance Process**

### **3.1001 Overview**

An established grievance process can be an effective tool for minimizing claims of wrongful or constructive discharge/termination against Montana's municipalities. Grievances from the employees can come from a wide range of areas including work rule or regulation, policy or procedure, health and safety regulation, wage, disciplinary action and non-probationary termination. The grievance process should be part of the municipality's written Personnel Policy Manual and all employees and supervisors should be instructed in its use upon hire.

Municipalities must provide terminating employees, even employees who are voluntarily leaving, a copy of the grievance process upon discharge and document in writing in the employee's personnel file that the employee was provided a copy of the grievance process. If the employee left employment and does not return to the city or town, a return receipt (or delivery confirmation) letter should be sent to the employee outlining the employee's rights under the municipality's grievance process.

An employee must first exhaust their internal grievance process prior to filing an action under the Wrongful Discharge Act. Mayors, managers and supervisors must be aware of the importance of the grievance process and their role in maintaining favorable relations with employees. Effective grievance handling is an essential part of cultivating good employee relations and running a fair, successful, and productive workplace.

The above comments are largely intended for employees who are not covered by a Collective Bargaining Agreement (CBA). Employees covered by a CBA may have negotiated grievance processes that are different from other non-union employees. In fact, some municipalities may have three or four different grievance processes; those for the individual unions represented in the city or town, the non-union employees and one for the Police Department.

### **3.1002 Role of Police Commission**

Police officer grievances are brought before the Police Commission, which is governed by [MCA 7-32-4151](#) through [7-32-4164](#). The Police Commission is designed to provide a forum that is separate and independent from the police department and acts as an appeal board for police officers. Specifically, [MCA 7-32-4155](#) sets forth the role of the police commission in hearing and deciding appeals brought by police officers, as follows:

1. The police commission shall hear and decide appeals brought by any member or officer of the police department who has been disciplined, suspended, removed, or discharged by an order of the mayor, city manager, or chief executive.
2. The police commission shall, at the time set for hearing an appeal of a police officer, hear and determine the appeal according to the rules of evidence applicable to courts of record in the state.

More information can be attained by reading the [Montana Police Commission Handbook](#), which has been prepared by the Montana Board of Crime Control. A copy of the handbook can be found here or contact the [Montana Law Enforcement Academy](#) (406) 444-9950 or visit their website.

### 3.1003 Grievance Policies and Procedures Resources

The Montana Municipal Interlocal Authority (MMIA) has a template Personnel Policy Manual available. Any policy or procedure that a city or town is contemplating adopting should be reviewed by the city attorney prior to implementation. In addition, as detailed earlier, the [Montana Human Rights Bureau has sample policies on grievance policies and](#) procedures available through their website.

#### **Sample Grievance Policy**

*Employees are allowed to use the grievance procedure without penalty, harassment or retaliation for doing so. Each grievance will be fully processed until the employee receives a satisfactory decision/explanation or until the employee's right of appeal is exhausted.*

*Employees should attempt to resolve all disputes prior to involving the (MAYOR/CITY MANAGER) and/or their designee. Employees are encouraged to discuss disputes with their supervisors informally and in a timely fashion. The Clerk/Personnel Director may attend meetings between the supervisor and employee if necessary. In the event a dispute cannot be resolved informally, the employee should file a grievance, in writing, to the supervisor and/or their designee within ten working days of the occurrence of the disputed issue. The written grievance should outline the disputed issue, relevant facts, and appropriate remedy. Upon receipt of the written grievance, the supervisor and/or their designee will investigate the dispute and respond to the grievance within ten working days of receipt of the grievance.*

*If the response is not acceptable to the employee, the employee may proceed to the next step. The employee may forward the written grievance and/or their designee's response to the (MAYOR/CITY MANAGER) and/or their designee with 14 calendar days from the date of the supervisor and/or their designee's response. The (MAYOR/CITY MANAGER) and/or their designee will investigate the grievance. The (MAYOR/CITY MANAGER) and/or their designee shall conclude their investigation and write a report within 30 calendar days from receipt of the grievance appeal. This step concludes the final appeal process for the employee.*

*Information concerning employee grievances is confidential information and is to be discussed only with individuals involved in the investigation or on a need-to-know basis. Management decisions on grievances will not set precedent and are at the discretion of the (MAYOR/CITY MANAGER) and/or their designee so long as it does not violate any laws, regulations or policies set forth in this manual. Management decisions are not binding on future grievances unless they are officially stated as a policy.*

### 3.1004 Workplace Violence

Workplace violence is considered any act or threat of physical violence, harassment, intimidation or other threatening, disruptive behavior that occurs at the work site. Municipalities are strongly encouraged to create a policy stressing zero tolerance for such behavior. An example policy follows.

#### Sample Workplace Violence Policy

The Town of XYZ is committed to preventing workplace violence and to maintaining a safe work environment. XYZ has adopted the following guidelines to deal with intimidation, harassment or other threats of or actual violence that may occur onsite or offsite during work-related activities.

All employees, citizens, vendors and business associates should be treated with courtesy and respect at all times. Employees are expected to refrain from fighting, "horseplay" or other conduct that may be dangerous to others.

Conduct that threatens, intimidates, or coerces another employee, citizen, vendor or business associate will not be tolerated. The Town resources may not be used to threaten, stalk or harass anyone at or outside the workplace, in person or via electronic communication such as email, social media, etc. The Town treats threats coming from an abusive personal relationship as it does other forms of violence.

Indirect or direct threats of violence, incidents of actual violence and suspicious individuals or activities should be reported as soon as possible to a supervisor, the HR specialist, or the Mayor/City Manager. When reporting a threat or incident of violence, the employee should be as specific and detailed as possible. Employees should not place themselves in peril, nor should they attempt to intercede during an incident.

The Town will promptly and thoroughly investigate all reports of threats of violence or incidents of actual violence and of suspicious individuals or activities. The identity of the individual making a report will be protected as much as possible. The Town will not retaliate against employees making good-faith reports of violence, threats or suspicious individuals or activities. To maintain workplace safety and the integrity of its investigation, the Town may suspend employees suspected of workplace violence or threats of violence, either with or without pay, pending investigation.

Anyone found to be responsible for threats of or actual violence or other conduct that is in violation of these guidelines will be subject to disciplinary action up to and including termination of employment.

The Town encourages employees to bring their disputes to the attention of their supervisor or the HR Specialist before the situation escalates. The Town will not discipline employees for raising such concerns.

This policy prohibits employees from bringing firearms or other weapons (including pepper spray, stun guns, batons, etc.) onto city/town premises. Law enforcement is exempt from this requirement. Employees are also prohibited from carrying firearms or other weapons in Town vehicles or in personal vehicles if conducting Town business.

### 3.11 Discrimination in the Workplace

Employment discrimination can take a number of forms, including illegal hiring and firing, on-the-job harassment, denial of a worker's promotions or raises and unequal pay. There are a number of federal and state statutes that

protect employees from discrimination in the workplace, including the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967. Montana Code Annotated, [Title 49 Chapters 1-4](#) outline basic rights, illegal discrimination, the governmental code of fair practices and rights of persons with disabilities within the state of Montana.

As specified by the state of Montana Human Rights Bureau, it is unlawful for an employer to treat an employee or applicant for employment differently because of his or her race, creed, religion, color, national origin, age, physical or mental disability, marital status, or sex. Montana's public employers are further prohibited from treating an employee or applicant differently because of his or her political ideas.

The Human Rights Bureau strongly encourages all Montana employers to develop effective discrimination policies and grievance procedures. Effective policies and procedures will protect your employees from discrimination and may prevent liability for violations of those laws. Sample policies and procedures, guidance and some consulting on these issues can be obtained by contacting the Human Rights Bureau at 1-800-542-0807. [A guide to Montana's Human Rights Laws](#) can be found on their website.

In order for a discrimination policy to be effective, it must be adequately disseminated and consistently applied. The policy should indicate what the consequences are for a violation of the policy and be referenced and incorporated into other business-related documentation such as job announcements, job descriptions, or corrective action materials. The policy must clearly identify appropriate and current contact information for discrimination complaints, including alternate contacts in case the harasser is the contact. After it has been developed, the policy should guide the development and implementation of all aspects of people management and provide a clear explanation of the responsibilities of both management and the applicant or employees.

The Governmental Code of Fair Practices requires local governments to conduct continuing orientation and training programs with emphasis on human relations and fair employment practices. An annual discrimination and harassment prevention training for all staff will normally meet this requirement.

### **3.1101 Harassment**

The Equal Employment Opportunity Commission (EEOC) defines harassment as unwelcome conduct that is based on a protected class. It is unlawful when any or all of the following occur:

- Enduring the offensive conduct becomes a condition of employment,
- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive, or
- The conduct is retaliation for filing a discrimination claim, participating in an investigation or opposing employment practices that the employee believes discriminates against people.

Municipalities should do their best to create a harassment free work environment as the impact of sexual harassment and other forms of harassment can alter the working environment if people feel intimidated or uncomfortable. This environment should include mandatory harassment awareness training, appropriate policies and procedures that have clear reporting requirements and prompt investigation of harassment complaints. Managers are mandatory reporters and must report any harassment claim that is witnessed or reported to them.

Harassment does not include the conduct or actions of supervisors intended to provide employee discipline, such as deficiency notices, performance evaluations, oral warnings, reprimands or other supervisory actions intended to promote positive performance.

### 3.1102 Investigating a Complaint of Harassment

Here are some general investigative guidelines to consider:

- Limit the number of persons who have access to information related to the investigation.
- While complete confidentiality may not be possible, keep the investigation and the facts under a strict "need to know" basis. Emphasize to all those involved in the investigation, including the complainant, the accused and witnesses, that it is the policy to keep discussions strictly confidential and that disciplinary consequences may result from a breach of this confidence.
- Avoid needless disclosure of information to witnesses. For example, instead of asking "Did you see Joe touching Joan?" ask "Have you seen anyone at work touch Joan in an offensive way?"
- If there is more than one allegation, treat each incident separately.
- To avoid liability for defamation, never broadcast the facts of a given situation or the results of your investigation to others or as part of a training exercise.
- During an investigation, every witness should be told that retaliation will not be tolerated. If retaliatory actions are taking place, notify supervisor.

### 3.1103 Initial Investigation Steps

1. Listen attentively and take the complaint seriously, even if the complaint initially appears questionable. Treat it as valid until the facts have been established. If the employee quits because she or he felt the complaint wasn't taken seriously, liability may be compounded. Avoid comments like "Maybe you're overreacting," or "I'm sure she/he didn't mean anything by it."
2. Set a professional tone for the interview and try to put the complainant at ease as it may be difficult and stressful for the employee to come forward. Keep a neutral perspective and maintain a professional demeanor.
3. Gather facts, don't make judgments. Stay away from comments such as, "Most people would be complimented by that" or "Maybe you shouldn't dress that way for work." Speak in a matter-of-fact, but supportive way, not one in which you appear to be "cross examining" the complainant.
4. Get answers to: "who, what, when, where, why and how." Encourage the complainant to be as specific as possible. Find out who did what to whom, when did events happen, why and how did they occur, and were there any witnesses. At this stage it would also be wise to ask the employee if he or she is concerned about retaliation, which is often a concern of harassment victims.
5. Try to avoid leading questions, such as: "Did she/he tell offensive jokes?" Instead, ask open-ended questions, such as: "What did she/he say?" or "Where did she/he touch you?"
6. Get a sense of what the employee views as an acceptable outcome to resolve the problem.

### 3.1104 Interviewing the Complainant

Explain to the complainant that the charges are serious, and that a thorough investigation needs to be completed before reaching any conclusions. Restate the policy against taking any adverse action against the employee for bringing the charge and ask the complainant to notify you promptly if any such actions occur.

Elicit specific details regarding the alleged harassment. Include questions on the type and frequency of conduct and what was said or done. Also, where it occurred, where the complainant was touched, the dates that the conduct occurred, the time period over which the conduct occurred, whether there was a pattern of previous episodes and

whether the complainant is aware of similar behavior by the accused toward other employees. Keep in mind that a complainant may have difficulty remembering exact events and dates. The investigator must persist in helping the complainant be as specific as possible.

Obtain the specific context in which the conduct occurred, including the nature and general description of the work area and location. Did the conduct occur at a work-related function, during working time, or after hours?

Determine the effect of the conduct on the complainant. Try to identify the type of effect (e.g. economic, non-economic and/or psychological). Was the conduct received as a joke, was it really unwelcome, did it embarrass, frighten or humiliate the complainant? Often, complainants contend that, while they may have given in to the demands made of them, they did so out of fear or because they felt threatened. It is important to remember that the real issue is whether the behavior was unwelcome.

Determine the time relationship between the occurrence of the alleged conduct, its effect on the complainant, and the time when the complainant made the report. If there was a time lag, find out why the complainant waited so long before reporting the situation. A plausible reason might be fear of retaliation. Prepare a chronology of events. Analyze if certain events may have triggered the complaint, for example, a denial of promotion, pay raise or transfer.

Find out what the complainant wants and how the situation might be resolved. Can the complainant continue to work for or with the accused? Will productivity be adversely affected? Will it be embarrassing or awkward? Ask the complainant if they might need counseling. Make no statements about the complainant's character, job performance or family life. This may result in liability for defamation.

### **3.1105 Interviewing the Accused**

Repeat the initial statement made to the complainant about the seriousness of the charge and the concern that no adverse action be taken against the complainant for bringing the complaint. Then, obtain a position statement from the accused. Identify the relationship of the accused to the complainant. Was the accused an agent of the employer, a supervisory employee, a co-worker or a non-employee? Remind employees of rights under both Weingarten (if they are unionized) and Garrity (if the investigation could lead to criminal charges made against them). Work with your city attorney for a written Garrity Notice for the employee to sign.

Discern whether there was any prior consensual relationship between the parties. How long have the parties known each other? Is there a history of group or individual socializing? Determine whether the accused directed, or had responsibility for, the work of other employees or the complainant, had authority to recommend employment decisions affecting others (for example, hiring, firing, promoting), or was responsible for the records of others.

Expect the accused to deny the charges. Observe the reaction. Note whether or not there is surprise, anger or disbelief. Describe the details of the allegation and note the areas of disagreement between the testimonies of both parties. If the accused denies the allegations, probe further to determine with the accused the background, reasons, and motivation that could possibly have triggered the complaint.

### **3.1106 Interviewing the Accused's Supervisor (When Applicable)**

Talk with the supervisor to learn about any discipline problems and behavior patterns of either party and to

determine if the supervisor knows anything about the relationship between the parties. Find out if the complainant reported the conduct to the supervisor. Was the supervisor in a position to observe the conduct? Should the supervisor have been alerted to the conduct? For example, was the conduct discussed in the presence of the supervisor or were there any rumors circulating? Determine if there is any documentation available such as letters, memos, reports or statements supporting the conclusion that the supervisor knew or had reason to know of the conduct.

### **3.1107 Interviewing Witnesses**

Obtain statements, from any witnesses that support or deny any of the complainant's allegations. This evidence is very critical to the investigation. Be aware that witnesses are often reluctant to come forward out of fear of reprisal. Assure witnesses that their cooperation is important and that their testimony will be kept as confidential as possible. Reaffirm the policy and the law's protection against retaliation against a person who assists in an investigation.

### **3.1108 Resolving the Complaint**

Prepare a written report of findings. Determine steps to be taken based on this report.

When trying to remedy the conduct, don't "punish the complainant" by moving her or him to less desirable hours or to a less desirable location. If the complainant is offered a transfer, it should be voluntary and the position transferred to should be equal to or better than the prior position.

Consider the severity, frequency and pervasiveness of the conduct when imposing discipline on the harasser. Be sure to follow your city's corrective action and discipline policies and procedures. There may be several options available up to and including discharge. Any form of discipline short of discharge should be accompanied with a warning that similar misconduct in the future might result in immediate discharge.

Be sure to allow the harasser the opportunity to follow the city's grievance policy. Conduct follow-up interviews with the parties to inform them of resulting actions. Provide follow-up after the conclusion of the investigation regardless of the outcome. A good rule of thumb is to follow-up at one, three, and six months.

### **Sample Equal Employment Opportunity and Americans with Disabilities Policy**

*The [CITY/TOWN] is an equal opportunity employer. The [CITY/TOWN] shall comply with all relevant federal and state laws, to include rules and regulations put forth by the Equal Employment Opportunity Commission, (EEOC). The [CITY/TOWN] shall adhere to all relevant provisions of the Americans with Disabilities Act, (ADA). The [CITY/TOWN] ensures equal employment opportunity regardless of race, religion, color, creed, national origin, sex, marital status, political belief, age, or mental/physical disability, (as defined by the ADA), unless such disability effectively prevents the performance of the essential duties required of the position and which are bona fide occupational qualifications that cannot be accommodated without undue hardship to the [CITY/TOWN].*

*If an employee believes that they have been subjected to discrimination, including harassment, based upon any of these factors, they should immediately contact their supervisor and pursue corrective action. If the employee feels they need to resolve the problem by filing a grievance, they should pursue action through the Grievance Procedure stated within the [CITY'S/TOWN'S] policy manual.*

## Sample Harassment Prevention Policy

It is the policy of the [CITY/TOWN] that harassment, based on a protected class will not be tolerated. Each individual has a right to work in a professional atmosphere that promotes equal employment opportunities and prohibits unlawful discriminatory practices, including harassment. Therefore, employees are expected to act in a professional, cooperative and respectful manner to all contacts.

It is the policy of the [CITY/TOWN] to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, religion, national origin, creed, sex, marital status, veteran/military status, genetic history, political belief, age or disability both in or outside the workplace, on or off shift, in person or via electronic communication such as email, social media, etc.

Any employee who perceives a conversation or event as harassment, whether the employee is involved or merely observing, should explain to the offender in a calm, but firm manner that the action is perceived as inappropriate and the employee wishes the behavior to stop. Should the behavior continue, the employee should report the activity to their supervisor, or the mayor, city manager or their designee.

The [CITY/TOWN] encourages reporting of all perceived incidents of discrimination or harassment. It is the policy of the [CITY/TOWN] to promptly and thoroughly investigate such reports with due regard to confidentiality. The results of the investigation will be communicated to the complainant and the offender. Discipline will follow guidance found in the Discipline Policy.

A follow up review will be completed if harassment allegations have been made to ensure the harassment has discontinued and all parties involved are not subjected to retaliatory behaviors.

### **Definitions of Harassment**

*Sexual Harassment:* According to the EEOC and Montana Human Rights Bureau, sexual harassment may include, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical advances of a sexual nature. For example:

- Occasions when such conduct, either explicitly or implicitly, is a term or condition of employment
- Submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individuals
- Such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may include a range of subtle and not-so-subtle behaviors and may involve individuals of the same or different gender. Examples may include unwanted sexual advances or requests for sexual favors; sexual jokes or innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; gestures; suggestive objects or pictures or other physical, verbal or visual conduct of a sexual nature.

*Other Harassment:* Harassing behavior based on any other protected characteristic. For example: verbal, written or physical conduct that denigrates or shows hostility or aversion toward another because of his/her race, color, religion, national origin, creed, sex, marital status, genetic history, sexual orientation, political belief, age or disability.

*Sample Harassment Prevention Policy Continued***Retaliation**

No hardship, no loss or benefit, and no penalty may be imposed on an employee as punishment for:

- a) Filing or responding to a bona fide complaint of discrimination or harassment;
- b) Appearing as a witness in the investigation of a complaint; or
- c) Serving as an investigator.

Please report any retaliation to your supervisor, mayor, city manager or designee. Any report of retaliatory conduct will be objectively, timely and thoroughly investigated in accordance with the [CITY/TOWN] investigation procedure. Retaliation or attempted retaliation is a violation of this policy and anyone who does so will be subject to disciplinary actions, up to and including termination.

## 3.12 Compensation

### 3.1201 Compensation Law

In addition to the broad authority of the city council to determine the compensation of all elected and appointed officials and city employees ([MCA 7-4-4201](#)), municipal compensation must comply with Montana's Wage and Hour Labor Laws, [MCA 39-3](#).

Official statements of policy and procedure are contained in the regulations formally adopted by the Wage and Hour Unit of the Montana Department of Labor and Industry. Inquiries about the Montana Minimum Wage laws and other Montana labor laws and their application will be answered by mail, telephone or personal interview at the Department of Labor and Industry Wage and Hour Unit, PO Box 201503, Helena, MT 59620-1503, (406) 444-5600, <http://erd.dli.mt.gov/labor-standards>. Sections of [MCA 39-3-401](#) to [39-3-409](#) provide for minimum wage and hours for workers in the state of Montana, delegating to the Commissioner of Labor and Industry the duty of administering the act, and providing enforcement.

### 3.1202 Minimum Wages and Hours

**General Provisions of the Wage and Hour Laws** – The Montana Minimum Wage Law of 1971 establishes minimum wage, maximum hours and overtime pay for all employment covered under the law – unless specifically exempted. The Montana Minimum Wage Law applies to all workers in Montana. Employees covered by the Fair Labor Standards Act must be paid at least the federal minimum wage but in no case can they be paid less than the wage required by Montana law – unless the law provides for a specific exemption. Montana's minimum wage is determined by [MCA 39-3-409](#). The minimum wage is subject to a cost-of-living adjustment based on the Consumer Price Index no later than September 30 of each year, which becomes effective January 1 of the following year. The [current Montana minimum wage can be found at the Montana Department of Labor and Industry's](#) website.

**Overtime Payment** – Unless specifically exempt by Montana law, all employees must be paid at least one-and-one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours in a work week.

Application of the overtime provisions of subsection (1) to the employment of firefighters and law enforcement

officers by the state must be consistent with the Fair Labor Standards Act of 1938, as amended, and consistent with regulations promulgated under the act. Executives, administrative, and professionals who are paid on a salary basis are exempt from overtime. (Salaried workers who do not meet the definition of executive, administrative, or professional must be paid overtime in addition to their salary.) The [definitions of these exemptions can be located at the Department of Labor and Industry’s](#) website or contact the Wage and Hour Unit at (406)444-6543 for more information on the exemptions from overtime.

**Avoiding the Salary Trap** – Employers must realize that even if they pay an employee a salary versus an hourly wage, they are still subject to the requirements of state and federal minimum wage and/or overtime laws. Payment of a salary by itself does not exempt an employee unless the business or the individual is exempted from the law.

**Holiday, Vacation, Sick and Severance Pay** – Overtime or premium pay is not required for working on holidays or weekends unless those hours are in excess of 40 for the workweek (or part of a collective bargaining agreement). Holiday pay is a benefit that may be paid at the employer’s discretion. Overtime is based on actual hours worked, absent practice or contract. Even though the total hours (work hours plus holiday, vacation, or sick pay) for the week might exceed 40, overtime pay is not required unless an employee actually worked more than 40 hours. Refer to the collective bargaining agreement and policy to determine what pay counts as hours worked.

### 3.1203 Frequently Asked Questions

<b>Employers can pay minimum wage for a certain period of time for training.</b>	<b>False</b>
<b>An employee is paid a monthly salary and performs clerical duties. This employee is not eligible to receive overtime pay.</b>	False
<b>An employee conducts a mandatory staff meeting after regular work hours. The time spent at the meeting is not during their scheduled work time, so the non-exempt employees need not be paid for that time.</b>	False
<b>A non-exempt employee lives in Helena and is traveling to Bozeman to attend a training seminar. The employee will leave at 7:00 a.m. and return to Helena at 6:30 p.m. on the same day. The employee normally works an 8-hour day. This employee only needs to be compensated for a regular 8-hour day.</b>	False
<b>The employer’s policy handbook indicates work hours are from 8:00 a.m. to 5:00 p.m. and will not pay any unauthorized overtime. A non-exempt employee works until 5:30 p.m. (without approval) to finish a project in order to be ready to begin a new project in the morning. Based on the fact the policy indicates overtime must be approved before being compensated, the employee does not need to be paid for the extra ½ hour worked.</b>	False
<b>The work week can begin any day of the week at any hour of the day as established by the employer.</b>	True
<b>It is the employee’s responsibility to keep track of all hours worked and to provide that information to the employer.</b>	False

### 3.1204 Travel Time

Time spent traveling throughout Montana is a time-consuming endeavor and may or may not be considered work time. The following is a breakdown to the variations stated in the Administrative Rules of Montana (ARM, 24.16.1010):

- **Home to work** - Normal travel from home to work is not work time. This is true whether employee works at a fixed location or at different job sites.
- **Home to work/emergency call** - Travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.
- **Home to work in another city** - All time spent traveling to another city would be considered work time except for the travel from home to public transportation, such as a bus depot, this would be the normal home to work travel. The usual mealtime would be deductible also.
- **Travel all in the day's work** - Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. If the employee goes home instead of returning to the employer's premises from last job site, this travel is home-to-work-travel and is not hours worked. If an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel time from the designated place to the work place must be counted as hours worked.
- **Travel away from home community** - Travel that keeps an employee away from home overnight is travel away from home and is clearly work time when it cuts across the employee's workday (employee is simply substituting travel for other duties). This time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. For example, if an employee normally works 8 a.m. to 5 p.m. Monday through Friday, the travel time during these hours on Saturday and Sunday are also counted as work time. If the employee requests to drive his car in place of public transportation that has been offered, this travel time is counted as hours worked or the time it would have been using public transportation.
- **Work performed while traveling** - Any work which an employee is required to perform while traveling must be counted as work time. One who drives and is required to ride as assistant/helper is working while riding. Sleep in adequate furnished facilities would not be counted as hours worked.

### 3.1205 Compensatory (Comp) Time

**Non-exempt staff** - Many municipalities have struggled with the appropriate use of compensatory or "comp" time with its hourly or non-exempt staff. In basic terms, comp time is utilized as an alternative to overtime pay for non-exempt employees. The Fair Labor Standards Act (FLSA) defines compensatory time off as paid time away from the job that is earned and accrued by an employee in lieu of a cash payment for overtime compensation, at the rate of no less than one and one-half hours of compensatory time for each hour of overtime worked. Under the Act, only government agencies may legally allow their non-exempt employees time off in place of wages.

**Who is eligible for overtime?** Under the FLSA and Montana wage and hour law, non-exempt employees must receive overtime pay for all time worked in excess of 40 hours per workweek. Overtime pay must be at least one and one-half times the employee's normal hourly wage rate. Municipalities subject to collective bargaining agreements may have an obligation to pay overtime after eight hours a day if it is specified in the union/employer contract.

**Too much of a good thing?** Compensatory time in lieu of overtime pay may minimize the immediate costs associated with extended workweeks, but it does not come without risk. It is important that employers consider the maximum liability associated with "banked" compensatory time. Any time on the books is considered compensation at termination – including compensatory time. It is important to not only limit the maximum accrual, but also the maximum time to use the accrued compensatory time to ensure a balanced accrual and use

relationship.

**Do we need a written policy?** It is recommended that municipalities establish a written policy that limits the number of comp time hours that can be accumulated in a fiscal year. If an employee reaches the limit before the end of the fiscal year, the municipality should switch to paying overtime until the comp time balance is reduced. In addition, if an employee is unable to take their comp time by the end of the fiscal year, one solution is for the municipality to pay the employee the amount due at the appropriate one and one-half rate and return the employee's comp time balance back to zero. These steps will help a municipality avoid staff building up thousands of comp time hours over the course of several years. Although an employer may allow an employee to choose between comp time and overtime pay, it is the municipality's obligation to ensure that the non-exempt employee is compensated for all time worked in excess of 40 hours per workweek.

**Exempt staff** - Municipalities may also establish a comp time policy for exempt employees, although it is not required under the Fair Labor Standards Act. Some factors municipalities may wish to consider as they design their comp time policy for exempt employees are:

- How many hours will an employee work in a workweek before they are eligible to earn comp time?
- Does the municipality want to limit the total amount of comp time that an employee can accrue at any given time?
- At what rate will employees earn comp time? One hour of comp time for each eligible hour worked?
- The policy should specify that comp time earned by exempt staff has no cash value upon termination or the end of the accrual period.
- At the end of the accrual period, does the municipality want to include a "use it or lose it" clause. An example would be that at the end of the accrual period (possibly fiscal year end), all comp time balances will be returned to zero.

In many cases, exempt staff may work in excess of 40 hours per week. They tend to be management staff, committed to the organization and critical to the organizations' mission. Many municipalities allow these exempt staff to earn and use compensatory time in a more flexible manner than non-exempt staff.

It is a challenge to employers when employees pose the idea that they are misclassified exempt, and were treated as non-exempt, therefore creating overtime and pay obligations for the municipality. It is critical that exempt positions are reviewed and classified exempt with the greatest of caution and are treated exempt in all possible scenarios. Keep good documentation as to why you made the position exempt. Delineating through policy the way the two different categories of employees earn time and use time is one way to ensure differentiation that successfully defends the municipality.

After considering these issues, if the employer elects to allow employees the option to earn comp time, document a compensatory time policy and communicate it to municipal employees. Employers must remember that employees who are subject to union contracts may be subject to different rules and policy implementation processes if specified by a collective bargaining agreement.

### **3.1206 Payroll Deductions**

In general, deductions from wages are lawful only under the following conditions:

1. The employer is required to do so by law – for example, federal and state taxes, Social Security, or a

garnishment order.

2. The employee has authorized in writing and the deduction is for the employee's benefit.

Employers must furnish itemized pay statements to each employee at the time of payment of wages showing all deductions for the pay period. If the employee has no deductions, the employer still needs to give a statement to the employee. The employer cannot withhold wages or make an employee pay for damages, mistakes or shortages. See [Attorney General Opinion 17, Volume 36 and Attorney General Opinion 25, Volume 11](#) at the following [website](#).

### **3.1207 Child Labor Laws**

The Montana Child Labor Standards Act of 1993 establishes the hours children may work and hazardous occupations in which they may not work - unless specifically exempted. The Montana Child Labor Laws apply to all children, migrant as well as resident children. It is the intent of these laws to protect young workers from employment possibly interfering with their educational opportunities or be detrimental to their health or well-being. These laws parallel, but do not supersede the federal child labor laws. The federal law is similar to the Montana law but is more restrictive in certain areas.

In addition to safety concerns, it is also important that municipalities understand how to deal with child labor standards, as seasonal employees are frequently minors. The Montana Child Labor Standards Act [MCA, 41-2 Part 1](#) should be reviewed to make sure that children/minors are not subjected to prohibited employment conditions.

Sections [41-2-106](#) through [41-2-108 MCA](#), address conditions that affect the employment of minors ages 14- 15; Section [41-2-110](#) addresses exemptions from prohibited employment of minors who are 16-17 years old. [Employment of minors standards can be found at the Department of Labor and Industry](#) website. Please contact MMIA or the Montana Department of Labor and Industry for more information on the employment of minors.

### **3.1208 Other Benefits**

One of the draws to employment with a government agency is the reliability of benefits. Government agencies, whether it be federal, state, county or city, are normally in the forefront of progress and stability for benefits. Following is a brief overview of some of the most commonly provided benefit options for government agencies. Utilizing the benefits as part of the draw to employment can offset the salary issue that is normally present due to budget constraints.

Health benefits include medical, dental and vision plans. There are standard offerings available that include a plan administered through a pool, self-funding, or fully-insured group.

*A pool* is a group of similar entities that "pool" their resources in order to spread the risk. MMIA is an example of a health plan pool. Each member entity contributes a certain amount per employee, and the pool works with a Third-Party Administrator (TPA) who receives, and processes claims according to the plan designed by the pool/member entity. The biggest cost in a pool is actual claims dollars.

*A self-funded group* is an entity or employer forming their own plan and contracting with a TPA to administer the claims. The risk is higher with a self-funded group because they absorb the claims as well as the administrative fees (just like a pool) but are restricted to spreading the risk with the amount of people insured from just their entity. A self-funded group is not subject to many of the same regulations as a fully insured group. Often, a self-funded group

(as well as a pool) will contract with a re-insurer. A re-insurer is, essentially, insurance for claims above a set amount. The group pays premiums and then if they have the need to pay on a high dollar claim that reaches the agreed upon threshold, they submit it to the re-insurer.

A *fully insured group* is the more traditional product when insurance is considered. The costs for a fully insured plan can be higher because the risk is not spread through a pool. Funds are directed to claims and administrative fees as well as components such as overhead, taxes, inflation, profit (for the insurance company), etc.

Determining which plan is best depends on many things such as eligibility to belong to a pool, entity size, needs of the municipality, financial solvency, and many more factors. Once that is determined, the actual plans themselves must be designed or chosen. Plan variables include the following:

- *Deductible* - Specified dollar amount that must be incurred before the plan will pay for each benefit period.
- *Co-insurance* - Set percentage amounts that indicate how the plan and covered employee share responsibility of allowable charges.
- *Out of Pocket Maximum (OOP Max)* - The maximum amount of co-insurance that an employee will pay before the plan begins paying 100%. This sometimes includes deductibles and copayments but not always.
- *Copayment* - Specified dollar amount payable by the employee for specific charges, often seen as an “office visit charge”. This amount is charged regardless of if the deductible has been met. It does not apply toward the deductible and usually not toward the Out of Pocket Maximum. The plan pays for any allowable amounts above the copayment.
- *Limitations & Maximums* - These can be visits, treatments, therapies, services or even dollar amounts. For example, a plan may set a limit of 30 chiropractic visits per year.
- *Allowable Amount* - Almost all TPAs utilize provider networks. There may be benefit differentials when utilizing in-network and out-of-network providers. However, the biggest reason to utilize an in-network provider is that those providers accept the set allowable amount as the amount of reimbursement and will not bill the difference between their charge and the allowable amount.

Catching conditions early on is a great preventive measure. Most plans include services that do just that, including, but not limited to, wellness programs, large case management, employee assistance programs, nurse lines, and wellness/preventive screenings.

*Flexible Spending Accounts*, also referred to as Cafeteria Plans, are pre-tax benefits available under Section 125 of the IRS. It is a tax-advantaged financial account that allows employees to set aside pre-tax earnings for qualified expenses. Qualified expenses include out-of-pocket medical expenses such as deductibles and copayments, dental and vision expenses, and many over-the-counter health items like aspirin or bandages. Dependent child care (daycare) can also qualify as an eligible expense on some Flex Plans. Any portion of health coverage premiums that an employee is responsible for can also be run through the Flex Plan so that premium payments are tax-free too.

Although there are obvious advantages to the employee as they are not paying taxes on these expenses, there are also benefits to the employer. The employer’s share of FICA tax (6%) is saved on every dollar an employee contributes to a Flex Plan. There are fees assessed to the employer to make the plan available. However, the fees are nominal compared to the FICA savings and the benefits made available to the employees.

#### Other Benefits to Consider

- *Life insurance* for the employee and their spouse and/or dependents - Most employers break this up into an automatic Basic Life policy and a Voluntary Life Policy to which the employee contributes.
- *Accidental Death & Dismemberment (AD&D)* - These premiums are nominal and yet it is insurance for future use if something were to occur. This is usually a supplement to traditional Life Insurance.
- *Short/Long Term Disability* - This is essentially paycheck insurance. Premiums are paid to purchase a policy that ensures ongoing paychecks in case of an extended illness that prohibits the employee from working. This is not Workers' Compensation Insurance that is required for the employer to provide. This is a supplemental policy paid for by the employee.
- *Voluntary Employee Beneficiary Association (VEBA)* - This is another pre-tax benefit available to employees under section 501 of the IRS Code. It is a voluntary group of employees that share an employment-related common bond, such as under the same collective bargaining agreement. This association of employees provides certain specified benefits to its members or their designated beneficiaries. It can be funded by the employer or the employee. Funds are contributed and held in a trust for payment of benefits that typically include health related expenses. The funds are not taxable, nor is the interest earned, however the benefits paid out may or may not be taxable depending upon the benefit.

## 3.13 Reporting Requirements Related to Personnel Management

### 3.1301 New Hire Reporting

All new hires must be reported in a timely manner. [The Montana Department of Public Health and Human Services has information regarding reporting new hires](#) on their website.

### 3.1302 Affirmative Action Plans

Affirmative action plans are required for all federal contractors and subcontractors with over 50 employees and contracts of \$50,000 or more. Such plans require tracking the recruiting efforts to advance qualified minorities, women, persons with disabilities and covered veterans and typically include training programs as well. Requirements on tracking and filing affirmative action plans can be complex. Most larger organizations hire outside consultants to assist with the process.

Affirmative action plans can also be required by a court as a remedy for discrimination or as a voluntary remedy for past patterns of discrimination and are often required as part of receiving grant funds.

### 3.1303 EEO-4 Forms

All local governments with 15 or more employees are required to keep records and to make reports to the Equal Employment Opportunity Commission. Political jurisdictions with 100 or more employees must file biennially and those with 15-99 employees may be selected as a sample of the employers to submit.

[To learn more about how to file visit the US Equal Employment Opportunity Commission's](#) website.

### 3.1304 Employee Benefits Reports

The Affordable Care Act (ACA) and other regulations may require reporting of information related to the employee benefits a city/town offers. It is important that a city/town work closely with their benefits provider to understand reporting requirements.

## 3.14 Personnel Records Management

### 3.1401 Functions of a Personnel Record System

Employee personnel files are a well-constructed layout of an employee's employment history that provide an at-a-glance insight into an individual's work performance, benefits history, prior work performance, criminal and background history, training and development, and numerous other documented employment facts. Personnel records bridge past performance with future opportunities and establish a foundation of documented accounts to be utilized in facilitating references, employment verifications and background inquiries. Each employer may design their own compliant recordkeeping systems. The design of each system must lay a firm foundation and structure supported by concrete policies and practices that assist in the maintenance, retention and safeguarding of employee records. The blueprint for this layout must factor in the employee's privacy, state and federal compliance laws, such as retention and recordkeeping, and employee accessibility to records. In addition, this system must facilitate mandated compliance reporting needs.

Each municipality should include a Personnel File Management Policy in their Personnel Policy Manual. For organizational purposes as well as legal protection, it is recommended that municipalities maintain separate, up-to-date, personnel files for each staff member. Specific questions about what to retain in a municipality's personnel files, especially those addressing confidentiality and public access, should be addressed to legal counsel.

#### Sample Personnel Management File Policy

*The (CITY/TOWN) maintains records on every employee related to their employment with the (CITY/TOWN). The employee's personnel file will contain information such as employment application/resume or cover letter, performance evaluations, training records, commendations and awards, disciplinary records, and resignation/termination records.*

*Such information will be obtained from the employee or from others with the employee's authorization. Any information obtained for EEOC compliance (Form EEO-4) and/or any medical information will be kept in separate, confidential files and accessed only on a need-to-know basis as authorized by the (MAYOR/CITY MANAGER) and/or their designee so long as it does not violate any laws, regulations or policies set forth in this manual.*

*Personnel files are confidential and only accessible to others on a need-to-know basis for personnel actions. Upon request to the (MAYOR/CITY MANAGER) and/or their designee or the Clerk/Personnel Director and with the (MAYOR/CITY MANAGER) and/or their designee or the Clerk/Personnel Director present, employees may inspect and make copies of their personnel records. Employees should contact the (MAYOR/CITY MANAGER) and/or their designee or the Clerk/Personnel Director to establish a convenient review time.*

### 3.1402 Personnel Files

All personnel related documents need to be filed in one of the following files:

Main Personnel File— all employees	Medical/ADA File— if applicable— (not to be viewed by supervisor)	Payroll File—all employees	I-9 File—all employees PLUS terminated for 1 year from term OR 3 years from hire (whichever is longer)	Safety Training File
Employment Application/Resume/Cover Letter	Worker's Compensation Information	W4	Separate from personnel file and divided by Active Employees and Terminated Employees	Safety meeting sign-in sheets & materials (i.e. toolbox talks, etc.)
Offer Letter	Medical/Doctor notes	Time Sheets	Suggest keeping a binder or file folder.	Safety training sign-in sheets & materials (i.e. lockout/tagout, HAZCOM, etc.)
Signed Job Description	ADA information	Attendance Records		Task specific training sign-in sheets & materials (i.e. skid steer, mower, chain saw, etc.)
Performance Evaluations	Drug Testing Information	Garnishments/R ecords		
Disciplinary Documents/Letters	EEO Survey	Direct Deposit Information		
Personnel Policy Handbook Receipt		Death Warrant		
New Employee Orientation Checklist- signed		Any other payroll related files		
Promotion Letters or Pay Increase Notices				
Emergency Contact (can keep in a separate file)				
Training and Development Summaries/Certificates (see comment below regarding safety training)				
Grievances from employee				

**Personnel file access** - Each municipality should develop a policy that identifies who has access to personnel records and for what reasons, as well as develop a records retention guide. Areas to consider in such a policy include the employee, human resources, supervisors, management, and regulatory agencies. Always balance freedom of information with the right to privacy laws. These guidelines should include when and where the file can be accessed, if the contents can be copied and if items can be added, etc. To maintain the integrity of the personnel file, access should be permitted only under some type of supervision. The confidential investigation file should only be accessed by management and HR unless court subpoenaed, then reviewed by legal counsel for release.

**Personnel file storage and record retention** - Personnel files should be maintained in locked file cabinets in a central location (as opposed to multiple drawers and cabinets in various departments). A good place to start in regard to developing a records retention schedule would be to visit the [Montana Secretary of State's](#) records retention guidelines on their website.

**Confidentiality and right to privacy** - In regard to the confidentiality of employee personnel files, it is the employee, not the municipality, who has the right to privacy of the information in the file. If a third party requests an employee's personnel records, inform the employee of the request in writing. Allow the employee to review his/her personnel records and identify which items he/she wishes to release. If any right to privacy is exercised, have the employee document in writing which records he/she is willing to release and which he/she wishes to maintain as confidential. Legal counsel should be consulted if there is any question as to what personnel documents should or should not be released to a requesting third party. No federal or state law requires an employer to maintain personnel records; however, various federal and state laws mandate that certain records be kept. For organizational purposes as well as legal protection, keep separate, up-to-date personnel files. The chances of becoming involved in legal actions related to hiring, supervision or firing decrease when personnel records are maintained correctly.

### **3.1403 Montana Occupational Safety and Health Act**

Municipal employers have the legal and moral responsibility to create and maintain a safe and healthful work environment for their employees. The protection of employees is required by law and is essential to the success of the municipality. This section will provide an overview of the occupational safety and health requirements for public sector employers and resources available for improving workplace safety. This section includes some full text references from the Montana Code Annotated and the Administrative Rules of Montana (ARM) because they include very clear direction to municipalities regarding legal obligations for occupational safety and health.

Public sector employers Montana are subject to occupational safety and health rules similar to private sector employers. However, whereas private sector is regulated, and enforcement jurisdiction is held by the federal Occupational Safety and Health Administration (OSHA), public sector is regulated, and enforcement jurisdiction is held by the Montana Department of Labor & Industry.

These rules are the minimum standards that an employer must implement and follow to protect the life, health and safety of employees. These rules are collectively known as the Montana Occupational Safety and Health Act. For complete details of the act, please review MCA Title 50 Chapter 71 Part 1 and ARM 24.30.102 through 24.30.107.

#### **MCA 50-71-114. Rulemaking – variances**

- (1) The department may adopt appropriate standards for safety and health by administrative rule, including:
  - (a) any safety or health regulations promulgated by the federal occupational safety and health administration; and
  - (b) standards that are not inconsistent with federal safety and health regulation but that provide for a greater level of protection for employees.
- (2) The department may adopt other rules that are reasonably necessary to implement this part.
- (3) (a) The department may by rule:
  - i) provide a procedure to grant a temporary variance from the particular provisions of a standard; and
  - ii) permit the temporary use of other or different devices or methods than provided by the standard.
- (b) A temporary variance may be granted only if the public sector employer:
  - i) has an effective program for complying with the standard as quickly as practicable;
  - ii) is taking all available steps to safeguard public sector employees against the hazards covered by the standard; and
  - iii) is unable to comply with the standard because:
    - (A) professional or technical personnel needed to implement compliance with the standard are temporarily unavailable;
    - (B) material or equipment needed to comply with the standard is temporarily unavailable; or
    - (C) necessary construction or alternation of facilities cannot be completed by the effective date of the standard.

#### **MCA 50-71-115. Applicability of Standards – exceptions**

- (1) The standards for safety and health and the enforcement rules adopted pursuant to this part apply to all public sector employers in this state and to public sector employees.

#### **MCA 50-71-116. Duties of public sector employers and public sector employees**

- (1) Each public sector employer shall:
  - (a) Furnish a place of employment that is free from recognized hazards that cause or are likely to cause death or serious physical harm to public sector employees;
  - (b) Adopt and use practices, means, methods, operations, and processes that are adequate to render the workplace safe; and
  - (c) Take appropriate actions necessary to protect the life, health, and safety of public sector employees.
- (2) Each public sector employee shall comply with the safety and health standards, rules, and orders issued pursuant to this part as they apply to the public sector employee's own actions and conduct.

#### **MCA 50-71-11 Public sector employer records and reports.**

- (1) Each public sector employer shall maintain records of occupational injuries, illnesses, and deaths as the department may require by rule.
- (2) The department may inspect those records or require that the public sector employer submit those records to the department for its review.
- (3) Except as otherwise provided by rule, a public sector employer complies with the requirements of this section if the public sector employer completes and submits a first report of injury form to the department or to the public sector employer's worker's compensation insurer within 30 days of the public sector employer becoming

aware of an occupational injury, illness, or death.

For additional details on recordkeeping requirements, please reference ARM 24.30.107.

### **ARM 24.30.102. Occupational Safety and Health Code for Public Sector Employment**

- (1) [Section 50-71-114, MCA](#), of the Montana Occupational Safety and Health Act provides that the Department of Labor and Industry may adopt, amend, repeal, and enforce rules for the prevention of accidents to be known as “safety codes” in every employment and place of employment, including the repair and maintenance of such places of employment to render them safe. The federal Occupational Safety and Health Act of 1970 does not include safety standards coverage for employees or political subdivisions of this state. It is the intent of this rule that public sector employees and political subdivisions of this state shall be protected to the greatest extent possible by the same safety standards for employments covered by the federal Occupational Safety and Health Act of 1970. The department is therefore adopting by reference certain occupational safety and health standards, adopted by the United States Secretary of Labor under the federal Occupational Safety and Health Act of 1970. The department has determined, with the assent of the Secretary of State, that publication of the rules would be unduly cumbersome and expensive. Copies of the rules adopted by reference are available and may be obtained at cost from the Montana Department of Labor and Industry, P.O. Bo 1728, Helena, Montana 59624-1728, or the Superintendent of Documents, United States Government Printing Office, 941 North Capitol Street, Washington, D.C. 20401.
- (2) As used in the rules adopted by reference in (3) and (4) (a), unless the context clearly requires otherwise, the following definitions apply:
  - (a) "Act" means the Montana Occupational Safety and Health Act (50-71-111 through 50-71-128, MCA).
  - (b) "Assistant secretary of labor" or "secretary" means the commissioner of the Montana Department of Labor and Industry.
  - (c) "Employee" or "public sector employee" means every person in this state, including a contractor other than an independent contractor, who is in the service of a public sector employer, as defined below, under any appointment or contract of hire, expressed or implied, oral, or written.
  - (d) "Employer" or "public sector employer" means this state and each county, city and county, city school district, irrigation district, all other districts established by law, and all public corporations and quasi-public corporations and public agencies therein who have any person in service under any appointment or contract of hire, expressed or implied, oral or written.
  - (e) “Establishment” means a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction, transportation, communications, electric, gas and sanitary services, and similar operations, an establishment exists as each main or branch office, terminal, station, etc. that either supervise such activities or are the base from which personnel carry out these activities.
  - (f) “Injury or illness” means an abnormal condition or disorder.
    - (i) An injury includes cases such as, but not limited to a cut, fracture, sprain, or amputation.
    - (ii) An illness includes both acute and chronic illnesses, such as, but not limited to a skin disease, respiratory disorder, or poisoning.
- (3) The Department of Labor and Industry adopts a safety code for every place of employment conducted by a public sector employer. This safety code adopts by reference the following occupational safety and health standards found in the Code of Federal Regulations, as of July 1,2018:
  - (a) Title 29, Part 1910; and
  - (b) Title 29, Part 1926.
- (4) The Department of Labor and Industry adopts reporting requirements related to occupational safety and health

for every place of employment conducted by a public sector employer.

(a) The reporting requirements adopted by reference are the following occupational safety and health reporting requirements found in the Code of Federal Regulations, as of July 1, 2018:

- (i) 29 CFR 1904.4 through 1904.11;
- (ii) 29 CFR 1904.29 through 1904.33;
- (iii) 29 CFR 1904.35 and 1904.36; and
- (iv) 29 CFR 1904.39 through 1904.42

(b) For the purposes of reporting fatalities, hospitalizations, amputations, and loss of an eye pursuant to 29 CFR 1904.39, the employer is to contact the Montana Department of Labor and Industry safety bureau by:

(i) electronic submission to the reporting application at the safety bureau's public web site at

<http://erd.dli.mt.gov/safety-health>; or

(ii) telephone at 1-844-669-5461 (toll free).

- (5) All sections adopted by reference are binding on every public sector employer even though the sections are not separately printed in a separate state pamphlet and even though they are omitted from publication in the Montana Administrative Register and the Administrative Rules of Montana. The safety standards adopted above and printed in the Code of Federal Regulations, Title 29, as of July 1, 2014, are considered under this rule as the printed form of the safety code and shall be used by the department and all public sector employers, employees, and other persons when referring to the provisions of the safety code. All the provisions, remedies, and penalties found in the Montana Occupational Safety and Health Act apply to the administration of the provisions of the safety code adopted by this rule.
- (6) For convenience, the federal number of a particular section found in the Code of Federal Regulations should be used when referring to a section in the safety code adopted in (3). The federal number is to be preceded by the term (5). Thus, when section 1910.27 of the Code of Federal Regulations pertaining to fixed ladders is to be referred to or cited, the correct cite would be "subsection (5) 1910.27 of section 24.30.102 ARM" or "ARM 24.30.102(5) 1910.27".

### **3.1404 Safety in Mines Other Than Coal Mines**

Municipalities that have mining operations, such as sand and gravel operations, have additional standards for safety and health in the workplace as it relates to those operations. Mining operations are governed by the Federal Mine Safety and Health Act of 1977, with regulation and enforcement held jointly by the federal Mine Safety and Health Administration (MSHA) and the Montana Department of Labor & Industry. These rules are the minimum standards that an employer must implement and follow to protect the life, health and safety of employees in mining operations.

### **MCA 50-72-101 Applicability of Chapter**

This chapter shall apply to all mines (except coal and lignite) and individuals, owners, lessors, lessees, agents, partnerships, corporations, managers, operators, or employers operating any surface or underground metal or nonmetallic mines in this state. These individuals, owners, lessors, lessees, agents, partnerships, corporations, managers, operators, or employers operating any surface or underground metal or nonmetallic mines (excluding coal and lignite) shall report the same to the department, state the name of the mine, the location of the same, the name of the company, person, or persons owning or operating the same, post-office address, and number of persons employed.

### **ARM 24.30.1311. INCORPORATION BY REFERENCE OF RULES REGARDING EMPLOYEE HEALTH AND SAFETY IN MINES OTHER THAN COAL MINES**

- (1) The department of labor and industry adopts and incorporates by reference the United States department of labor, mine safety and health administration's regulations, Title 30, Code of Federal Regulations, Parts 46, 47, 48,49, 50, 56, 57, 58, and 62, revised as of July 1, 2004.
- (2) The regulations incorporated by reference in (1) relate to the following:
  - (a) Training and retraining of miners engaged in shell dredging or employed at sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mines;
  - (b) Hazard communication (HAZCOM);
  - (c) Training and retraining of miners;
  - (d) Mine rescue teams;
  - (e) Notification, investigation, reports and records of accidents, injuries, illnesses, employment and production in mines;
  - (f) Safety and health standards – surface metal and nonmetal mines;
  - (g) Safety and health standards – underground metal and nonmetal mines;
  - (h) Health standards for metal and nonmetal mines; and
  - (i) Occupational noise exposure.
- (3) Copies of the regulations incorporated by reference in (1) may be obtained at cost from the Montana Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728, or the Superintendent of Documents, United States Government Printing Office, 941 North Capitol Street, Washington, D.C. 20401.

### **3.1405 Montana Safety Culture Act**

In addition to the requirements found in Montana Code Annotated Title 50 Health and Safety, Chapter 71 Occupational Safety and Health that are listed above, all employers of Montana are subject to the Montana Safety Culture Act, found under Title 39 Labor, Chapter 71 Workers' Compensation.

#### **MCA 39-71-502 Purpose**

The purpose of this part is to reduce the incidence of occupational injury and illness by promoting safety in the workplace in order to control the costs of claims for workers' compensation insurance. The creation of a safety culture requires employers to provide training and education to make safety awareness part of the requirement for each

worker's satisfactory job performance and requires the department to promote safety awareness for the public through education and preparation of each student for entrance into the labor market. A reduction in workplace injuries, illnesses, and deaths through enhanced safety on the job benefits the public as well as the employers and the employees by lowering both financial and physical costs. Ensuring immunity to insurers in the provision of safety consultation services encourages and promotes safety in the workplace and improves the relationship between employers and employees.

#### **MCA 39-71-1505 Rulemaking authority.**

The department shall adopt rules, including but not limited to rules that require:

- (1) Each employer to conduct an educational- based safety program, including but not limited to:
  - (a) A safety program to provide:

- (i) New employee general safety orientation;
  - (ii) Job or specific safety training; and
  - (iii) Continuous refresher safety training, including periodic safety meetings;
  - (b) Periodic hazard assessment, with corrective actions identified; and
  - (c) Appropriate documentation of performance of the activities; and
- (2) An employer of more than five employees to have a comprehensive and effective safety program, including but not limited to:
- (a) Subject to subsection (3), a safety committee composed of employee and employer representatives that holds regularly scheduled meetings;
  - (b) Procedures of reporting and investigation for all work-related incidents, accidents, injuries, and illnesses; and
  - (c) Policies and procedures that assign specific safety responsibilities and safety performance accountability.

For additional details on requirements for employer safety programs and the Montana Safety Culture Act, please reference ARM 24.30.2521, ARM 24.30.2541, and ARM 24.30.2542.

### 3.1406 Links to Federal Safety & Health Standards

Reference the links below to review the federal standards that have been incorporated by reference into the Montana Occupational Safety and Health Act.

Federal Occupational Safety and Health Act of 1970

[Code of Federal Regulation Title 29, Part 1910](#)

[Code of Federal Regulation Title 29, Part 1926](#)

The Federal Mine Safety and Health Act of 1977

[Mine Safety and Health Act website](#)

[Code of Federal Regulation Title 30, Parts 46,47,48,49](#), [Part 50](#); [Parts 56,57,58](#); and [Part 62](#)

### 3.1407 Resources for Developing a Safer Workplace

Resources available to municipalities for developing a safer workplace include:

- (1) **Montana Municipal Interlocal Authority (MMIA)** - Members of the MMIA have access to onsite and telephone consultations to review operations and exposures; on-site training; custom webinars; regional group training opportunities, quarterly newsletters; risk management bulletins; video libraries; sample policies; and, self-audit tools. Visit [www.mmia.net](http://www.mmia.net) or call (406) 443-0907 for more information.
- (2) **Montana Department of Labor and Industry** – DOL provides consulting services for employers with less than 250 employees.
  - [DOL consulting can be accessed through their website](#) or by calling (406) 494-0324.
  - DOL provides several training opportunities:
    - Safety First is free general safety and health training open to all employers. Find out more at <http://safetyfestmt.com/>.
    - A range of mine safety and health training opportunities are offered to all. Find out more at [DOL's Mine Safety and Health website](#) or by calling (406) 444-6401.

- (3) **Insurance carriers-** For municipalities that are not members of the MMIA self-funded coverages, contact your workers' compensation insurance carrier for a list of services.

## CHAPTER IV MUNICIPAL BUDGETING

by

Kenneth L. Weaver, Ph.D.

### 4.1 Municipal Budgeting

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- 4.1 Model BARS Budget Expenditure Format
- 4.2 Model Tax Levy Requirements Schedule
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## 4.1 MUNICIPAL BUDGETING

### 4.101 Budget Defined

A municipal budget is a legally required plan of expenditures [7-6-4001, MCA](#), that is balanced by anticipated revenues during the government's fiscal year which, in Montana, runs from July 1 through June 30. The budget format and fund structure must conform to the requirements of the Montana Department of Administration's Budgeting, Accounting and Reporting System (BARS). The BARS Chart of Accounts is administered by the Local Government Services section of the Statewide Accounting Bureau. By law, the required annual municipal budget resolution must:

1. Be approved by the city/town council by the later of the first Thursday after the first Tuesday in September, or within 30 calendar days of receipt of the municipality's taxable value from the Department of Revenue;
2. Include a specific *appropriation of public funds* (the government's annual spending authority);
3. Set the annual *property tax mill levy* that will be borne by the owners of all taxable property within the municipal jurisdiction.

Beyond its legal, financial management and accounting functions, a municipal budget also serves as historic documentation of the civic problems that confront a community and the city or town government's plan to address those problems. Moreover, the budget probably reveals the governing body's political compromises and agreed upon-goals for the future. Hence, the final adoption of the annual budget marks the culmination of the council's *policy-making process* and the beginning of the executive branch's *resource management process*.

### 4.102 Annual Budget Required

An annual budget is required for all fund entities, including those funds supported by property taxes (e.g. the general fund) and those funds supported by non-tax revenues (fees) such as the water fund and the wastewater fund. (See Section 4.106 for a more detailed description of governmental fund accounting and the various types and purposes of municipal funds.)

### 4.103 Budgeting Limitations

There are a number of provisions included in the Local Government Budget Act [7-6-4001, MCA](#), that impose significant limitations upon municipal officials. Among the more significant of these budgeting limitations are:

- A municipal official may not make an expenditure of public funds or incur an obligation to expend public funds *in excess of the total appropriation approved by the governing body*. An official who violates this limitation is *personally liable* for the amount of the expenditure, [7-6-4005, MCA](#).
- The final budget must be balanced so that planned appropriations do not exceed the available resources and anticipated revenues during the fiscal year, [7-6-4030, MCA](#).

#### 4.104 Budgeting Terminology

**Appropriation** – an authorization by the governing body enabling local government departments to make expenditures or to incur financial obligations for a specific public purpose. The expenditure authorization is limited to the fiscal year of the approved budget *and may not be exceeded except by lawful amendment of the budget by the governing body.*

**Budget** – the plan of expenditures and revenues approved and authorized by the annual budget resolution of the governing body to meet the essential public safety, public health and public well-being needs of the city/town or county during a specific fiscal year. A “line item budget” is formatted by object code to document the source of revenues as well as the departmental origin and purpose of expenditures. A “program/performance budget” includes the necessary accounting detail but is expanded to provide documentation of the funded program objectives and the associated performance measures that will be used to evaluate the outcomes and public benefits to be derived from the budgeted expenditures.

**Capital Improvement Program (CIP)** – a method provided by law [7-6-616, MCA](#) for funding the replacement, improvement or acquisition of local government property, facilities and equipment that costs in excess of \$5,000 and has a life expectancy of five years or more.

**Enterprise Fund** – a governmental fund type used to account for the revenues and expenses (including depreciation) of proprietary services provided by a local government on a “fee for service” basis, similar to private business enterprises, rather than on a tax-supported basis. Water, wastewater (sewer) and solid waste (garbage) and ambulance services are typical examples of municipal enterprise activities.

**Fiscal Year** – a twelve-month governmental accounting period limiting the authorization of expenditures and enabling annual reconciliation of the government’s financial position. The fiscal year for state and local governments in Montana is July 1 to June 30.

**Unrestricted Fund Balance and Net Position** – for governmental funds, the fiscal year end cash, less outstanding liabilities (Cash Available) that is not restricted by an outside third party. For enterprise funds, the unrestricted fund equity is designated the Unrestricted Net Position. Restrictions must be made by a third-party outside of the government. The government itself can only commit fund balance or net position. This is an important trend indicator of the financial soundness of a governmental fund or unit of government.

**G.A.A.P.** – “Generally Accepted Accounting Principles” recognized by the accounting profession and by the Government Accounting Standards Board (GASB).

**General Fund** – a fund used to account for the ordinary operations of a local government which are financed by property taxes and other non-tax, general revenues and not accounted for in another governmental fund.

**Property Tax Mill** – one thousandth of the total property certified taxable valuation of a taxing jurisdiction. The mill is used to apportion the costs of providing government services in proportion to the taxable value of property owned by the taxpayer. Thus, if the total *taxable valuation* of a city is \$2,000,000, a one mill levy would yield \$2,000 in property tax revenue ( $\$2,000,000/1,000$ ). By the same token, if a residence has a *taxable* value of \$5,000, a one mill levy on the property would yield \$5 in property tax revenue. If the mill levy required to balance the city/town budget is 100 mills, the municipal property tax on that same residence would be  $100 \times \$5$ , or \$500 which would be *added* to the county, school and state mill levies.

**Certified Taxable Valuation** – the portion (percentage) of the “appraised value” of any property that is subject to a property tax mill levy. Both the “appraised value or market value” and the resulting “certified taxable value” are determined by periodic, appraisals conducted by the Montana Department of Revenue applying a “tax rate” enacted by the legislature and furnished to all units of local government as annual, certified “taxable values” lying within the local government’s jurisdiction. The taxable value is the basis for the local government’s mill value which, as noted above, is the taxable value of the jurisdiction divided by 1,000.

## 4.105 The Budget Process

A basic grasp of *governmental fund accounting* is the first step in making sense of the municipal government's budget and the budgeting process.

### **Governmental Fund Accounting**

The Montana Budgetary, Accounting and Reporting System (BARS) implements *governmental fund accounting* for local governments in conformance with *generally accepted accounting practices, or GAAP*. (See Montana Code Annotated Title 7, Chapter 6, Part 40 for the Local Government Budget Act.)

Unlike private business, a unit of local government must be able to demonstrate that *an expenditure of public funds was for the purpose intended by the law* that enabled the government to collect its revenue from taxpayers and rate payers. Also, the government must be able to document that *the expenditure was within the limits of the lawful spending authority (appropriation)* that must have been approved annually by the governing body. For example, a municipal government must be able to show that property tax dollars derived from a mill levy for the library were spent only for the library and no other purpose and that the annual expenditures for the library did not exceed the municipal appropriation for the library, which can only be made by the city or town council. Similarly, a municipal government must operate its water and wastewater systems on the *fee for services* received from its *rate paying* customers and it should do so without relying upon its *general fund* tax dollars.

*Each stream of revenue and the associated expenditures must be accounted for within a specific governmental fund.* In Montana municipal government, there are some required governmental funds, always the property tax supported *general fund*, if applicable, the *enterprise funds* used to account for the rate-based utilities (such as water and wastewater), and perhaps a bond debt service fund. *Each of these different funds requires its own annual budget.* In Montana, all of these budgets must be approved and adopted by the later of the first Thursday after the first Tuesday in September, or within 30 calendar days of receipt of the municipality's taxable value from the Department of Revenue, even though the state and local fiscal year commences on July 1.

### **The Budget Structure**

A municipal government's finances revolve around four basic questions:

1. *How much money do we have to start the budget year? (beginning cash available)*
2. *How much money do we expect to receive during the budget year? (revenue estimates)*
3. *How much money do we expect to spend during the budget year? (appropriations)*
4. *How much money do we expect will be left at the end of the budget year? (anticipated ending cash available)*

These four questions should enable a newly elected municipal official to grasp the "big picture" of governmental budgeting. However, the actual budgeting process and the structure of the Montana BARS budget are made somewhat more complicated by law, presumably for the purpose of standardized preparation and reporting, thereby enabling review and oversight by state government. Moreover, few municipal clerks (the individuals who are most frequently responsible for assembling the budget) are certified public accountants and, therefore, they need some standardized guidance in budget assembly and documentation. To these ends, state law specifies the structure and elements of the Department of Administration's BARS standardized budget format, briefly described here.

The annual operating budget *for each governmental fund* is comprised of the same basic elements, which commonly include:

1. Detailed listings of proposed expenditures by department and further categorized in terms of personnel costs, operations costs and capital costs. (See ATTACHMENT 4.1 at the end of this chapter for a model of the BARS tabulation of expenditures);
2. A comparison of proposed expenditures with present year actual expenditures;
3. A listing of anticipated revenues by source;
4. A comparison of anticipated revenues with present year actual revenues; and
5. The Tax Levy Requirements Schedule summarizing the proposed spending, the required financial resources and the consequent property tax impacts, if any, for each governmental fund. (See Attachment 4.2 at the end of this chapter for a model of the BARS *Tax Levy Requirements Schedule*, which is a particularly useful document in summarizing the entire budget.)

Each of these five components of a local government budget is required by law and serves a specific accounting or management purpose and each reveals a different aspect of the municipal government's financial future. For example, the mayor of a small town may be most interested in the detailed listing and comparison of his departmental staffing and expenditures, while a prudent municipal council member may be focused on any changes in the proposed property tax mill levy, or the finance officer of a large city may be eager to track any downward trend in the government's year-end "fund balances".

Learning what questions to ask of a local government's budget and where to find the answers in the budget is the first and perhaps most important step in understanding the financial health of that government. Familiarity with this basic structure of a municipal government's budget is the key to understanding the capacity of a particular government to deal with the financial challenges it will face in its immediate future.

#### 4.106 The Budget Cycle

Perhaps because the municipal budget is usually developed in May and June for final approval by early September, there is an understandable tendency to think of the budget primarily as a governmental "rite of spring". In fact, the four stages of the annual budget cycle are (or at least should be) continuous throughout the year. Each of these four stages in the budget process is described next.

##### 1. **Data Collection and Assembly**

This is usually thought of as the first step in producing the annual budget, even though it might also be usefully characterized as the continuation of the preceding year's budget. In either case, the primary activity involved at this stage is gathering of factual data and estimates *concerning proposed expenditures and anticipated revenues*. Typically, the heads of the operating departments (such as a city police department) are asked to provide their best estimates of the department's resource needs and any anticipated revenues for the coming fiscal year. These departmental estimates are collected by the organization's budget or finance officer who is most often the municipal clerk-treasurer. The budget officer then combines the departmental estimates with other financial data, such as anticipated tax revenues and carry-over fund balances from the preceding fiscal year, to assemble a working draft budget. The draft budget is then further developed, usually in direct consultation with the several department heads by the chief-executive officer, who may be the mayor or city manager. The end product of this stage of the budget cycle is a *preliminary annual operating budget* for each of the governmental funds [7-6-4020, MCA](#).

##### 2. **Legislative Review, Modification and Adoption**

The process of reviewing, modifying and finally adopting the annual budget is primarily the business of the governing body and it is inherently an exercise in local government politics. As one of America's earliest

pioneers in the development of political theory would have observed, this step in the budget process is about answering the political question, “*Who gets how much of what?*” The ever-increasing needs of the several departments usually exceed available resources and must be disciplined by the reality of too few dollars. The imperative of the council or commission to assure the protection of the public’s health and safety may be contradicted by a nagging concern about electoral consequences of constituent discomfort with any increase in taxes or fees. And, the urgent need for repairs to the water system or the roof on the city hall must be balanced with a prudent concern for incurring too much debt that will limit the financial flexibility of the government for years of future uncertainty.

After a series of internal meetings with department heads, followed by the required public hearing (which may be seldom attended by the public), the municipal government’s annual operating budgets, along with appropriations and tax levies, will be adopted by majority vote of the governing body by the later of the first Thursday after the first Tuesday in September, or within 30 calendar days of receipt of the municipality’s taxable value from the Department of Revenue.

### **3. Implementation**

Following commission or council approval, the departments of the executive branch have their *spending authority* for the new fiscal year. They may now set about managing available financial resources to accomplish plans of work. They must be mindful that it is *unlawful for them or any official in the government to authorize an expenditure of public funds in excess of the department appropriation* made by the governing body in the annual budget. However, should the need arise to augment a departmental budget, the governing body is free to do so by means of a formal *budget amendment*, which, like the original budget itself, requires a public hearing, and the affirmative vote of a majority of the governing body, [7-6-4031, MCA](#).

### **4. Monitoring**

Too often the budget/finance officer or clerk-treasurer is the only person in local government who seems to remember that a budget is based almost entirely upon *estimates of revenues and expenditures*. If a municipal government has based its planned expenditures on an estimate that it will receive \$500,000 in non-tax revenue and, at the end of the year, discovers that it only received \$400,000, there will be a challenge. Clearly, the remedy for overly optimistic estimates is regular *monitoring of revenues and expenditures*. The governing body and the executive must know whether projected revenues are on track during the year so that, if necessary, they can adjust actual expenditures downward, irrespective of the original appropriation, and do so in a timely manner. An additional precaution employed by prudent municipal officials is the maintenance of an ample cash reserve position (perhaps 25 percent) to buffer unexpected revenue shortfalls. For smaller units of local government, *quarterly monitoring of revenue and expenditure trends and reporting the trends to the council or commission is probably sufficient to head off financial surprises*. However, modern and increasingly inexpensive computer technology has made *monthly monitoring and reporting relatively easy and prudent*. The data collected in the process of monitoring execution of the annual budget will also provide the baseline data for next year’s budget.

Additionally, the habit of periodically monitoring revenues and expenditures throughout the budget year will make it easier to construct longer term *financial trend indicators* so that local officials and the public can track changes in the financial health (structural balance) of the government. Financial trend monitoring can be as simple as graphing year---end fund balances (working capital balance for the enterprise funds), total revenues by source, total expenditures by fund type and perhaps the level of debt. The result is a snapshot of the financial condition of the government for a given year which will, in turn, provide an early warning of any significant changes from year to year that may need to be remedied. (See ATTACHMENT 4.3 at the end of this chapter for a simple model of a financial trend indicator.)

### 4.107 Alternative Budget Strategies

A well-tested improvement in the traditional *line item, incremental budget* strategy used by most of Montana's local governments is some version of a *program and performance budget* model. Additionally, the practice of including a long-term *capital improvement program (CIP)* as an integral part of the local government budgeting process is, by no means, a common practice of Montana's city and towns *even though it should be*. Both of these budgeting innovations are briefly described below.

#### ***Program and Performance Budgeting***

The standard BARS budget format is typical of a governmental line item budget which is designed primarily as an accounting document rather than as a management tool. While the line item format details the personnel, operations and capital costs of each department and therefore helps account for and limit expenditures, it will not help the executive, the governing body or the attentive citizen-taxpayer understand what specific public service benefits will be provided and at what cost to the taxpayer. How many blocks of city streets will be graded and resurfaced for the \$500,000 budget for the street department? How many kids will be taught to swim by the \$50,000 property tax subsidy to the community swimming pool? Which expenditure will have the most beneficial impact on the community's public safety, a new fire engine OR four new police cruisers?

*Performance budgeting* and its precursor called "program budgeting" focus on the specific *programs and measurable outcomes* produced by governmental expenditures. For example, in preparing his annual departmental budget proposal the fire chief may be asked to estimate the number of fire inspections that will be made as a service of the fire department's *fire prevention program*, as distinct from the department's *firefighting program*. All of the budgeted costs of the fire prevention program can then be linked to the number of fire prevention inspections that are planned and subsequently performed as measurable service delivery *outcomes*. As a result, a rational basis for resource allocation, planning and improved service delivery can be achieved during the annual budgeting process. (See ATTACHMENT 4.4 at the end of this chapter for an example of a department's program budget with performance measures included.)

#### ***Capital Improvement Program (CIP)***

Montana budget law provides that municipal governments may appropriate money to a *capital improvement fund* from any source, including funds that have been allocated in any year but have not been expended or encumbered by the end of the fiscal year, [7-6-616, MCA](#). The CIP must be formally adopted by resolution of the governing body and should include a prioritized schedule for replacement of *capital equipment or facilities with a minimum \$5,000 value and a five-year life span*, as well as the estimated cost of each item. The purpose of the CIP is to identify long-term capital replacement priorities of the local government and to earmark some portion of the annual operating budget to fund the replacement or acquisition of capital items on a systematic basis, as approved by the governing body. It is, in essence, a way for the local government to "pay as it goes" by building the costs of capital replacement into the annual operating budget and, therefore, into the annual property tax mill levy or utility rate structure.

### 4.108 Roles and Responsibilities

The annual budget of a municipal government invites conflict between the legislative and executive branches. At stake, of course, is nothing less than whose "good ideas" will get funded? Which department will get a budget increase, and which will be cut? Which ward or commission district will get its streets or roads paved next year and which in five years? The local government's annual struggle to answer these and a thousand other locally relevant questions can be made economically rational, politically defensible and certainly less stressful by means of a clear understanding of the appropriate budgeting roles to be filled by the *governing body* and by the *executive*.

### **The Governing Body**

The final budget must, in theory, be approved by the governing body before any public money can be spent. (See [7-6-4025, MCA](#) for an important exception.) Therefore, a strong case can be made that the budget should, in substantial measure, reflect the *goals* and priorities of the governing council or commission, even if those goals are, in fact, developed by the executive branch for consideration and possible adoption by the governing body. Despite the self-evident virtue of this proposition, the practice in too many Montana municipalities is to treat the budget process as the mechanical, four-step sequence described above (data collection, legislative review, implementation and monitoring) and to do so without taking the time to formulate, articulate, and agree upon the *council or commission's specific goals and priorities for the coming budget year*. As a result, very scarce local resources could end up allocated to the municipal department with the best argument, to the neighborhood or citizen group with the most political clout, as a compromise between feuding council members or, worse, "pretty much the way we did it last year". Perhaps this mechanical approach to budgeting is the reason that so few municipal budgets are accompanied by a *budget message* explaining the public purposes (goals) to be accomplished by the local government with taxpayer dollars.

The mechanical budgeting style mentioned above will, in fact, produce a budget for the coming year. What it will not produce is orderly, predictable and affordable improvements in the well-being of the community. Nor will it generate much trust in the ability of the municipal government to address and solve community problems with the available resources, which is, after all, the reason to have a local government in the first place. In short, the members of the governing body simply must take the time to formulate, articulate and agree upon their fundamental goals and priorities *before* they start allocating public resources.

### **The Executive**

To emphasize what ought to be the important role of the governing body in goal setting, there was but passing reference to the involvement of the executive branch in the process described above. In reality, it is more often true than not that the executive side of the municipal government will play a key role in defining the goals to be funded in the annual budget. Even in the commission-manager form of government wherein the boundary between the policy-making role of the commission and the policy implementation role of the manager is most clearly defined, the expertise, time and staff support available to the chief executive makes executive involvement virtually imperative in the commission's goal setting process. In the traditional commission-executive (mayor-council) form of municipal government, executive involvement in setting the goals of the legislative branch is unavoidable and is probably essential simply because the mayor usually serves as the council's presiding officer.

The typical dependence of the governing body on the executive branch for information, analyses, expert opinion, assessment of viability and resource availability when setting its budget goals is the friction point that can, and too often does, lead to conflict between the two branches of municipal government. For example, the role of the chief executive in virtually all forms of Montana's municipal government includes the legal responsibility and authority to prepare the budget for commission or council consideration and adoption. Moreover, virtually any chief-executive at any level of government (or in business for that matter), is very likely to have his or her own notion of the appropriate goals and priorities for the organization. It should come as no surprise that the executive's goals may or may not be in harmony with the goals of the governing body. Unless there is an opportunity for the governing body to formulate, discuss and then communicate its goals and priorities to the executive *before* they complete their version of the budget, the executive budget will reflect only the resource allocation recommendations of the chief executive. In this common situation, the members of the governing body are confronted with the typical dilemma of trying either to second guess and micro-manage the executive budget or, in order to avoid conflict, simply rubber-stamp the spending recommendations of the executive. The result is not likely to be either a good budget or an example of good government in action.

#### 4.109 Establishing Budget Goals

Fortunately, the remedy to a fragmented budgeting process is remarkably simple. The governing body and the chief-executive must establish a routine that enables the governing body to undertake and complete an *annual goal-setting process*, however formal or informal the process may be, prior to the time the chief-executive must initiate the assembly of the executive budget. This essential and prerequisite step to effective budgeting may not always be free of conflict but it is likely that the conflict will focus on competing goals and priorities rather than on the micro-management details of budget implementation. In short and as stated at the outset, effective budgeting in local government requires that the members of the governing body simply must take the time to formulate, articulate and agree upon their fundamental goals and priorities before they approve the allocation of public resources. In doing so, they will find preparation of the budget and the annual budget message is much easier to accomplish and that the public's trust in their government is more forthcoming.

The governing body's *goal setting process* can be as simple as a scheduled and noticed discussion of next year's top two or three goals of each member of the governing body, along with input from the mayor or manager or department heads. These relatively informal, intra-governmental discussions should, of course, be followed by an opportunity for public comment and input. Of utmost importance, however, is that some formalized process (voting) should be undertaken to find agreement by the commission or council on its collective goals and priorities for the coming year. The agreed upon and written goals and priorities, whether the result of informal discussions or of a more rigorous, facilitated and multi-year goal setting process, should then be provided to the executive branch early enough in the budget cycle (February or March) to serve as guidance to the mayor or manager as they go about assembling the preliminary budget for council approval.

#### 4.110 Municipal Government Revenue Sources

In the most general terms, the two sources of revenue available to municipal governments are local *tax revenue* (primarily from local property tax) and *non-tax revenue*. In Montana, approximately half of municipal general fund expenditures are funded by locally-imposed property taxes. The balance of the annual city or town budget is typically funded by non-tax revenues. Each of these two sources of revenue for local government is described below.

##### 1. Local Taxes

Locally-imposed *property tax* usually provides the largest single source of a municipal government's operating revenue. The actual amount of property tax revenue available to a particular local government depends upon two variables:

1. the *taxable value* of property located within the municipal jurisdiction; and
2. the amount of the municipal government's annual *mill levy*.

The average mill levy for municipal governments in FY 2017 was approximately 185 mills. However, the average mill value (taxable value divided by 1,000) for FY 2017 of 127 municipalities (not including the two consolidated governments) was \$7,065 but varied from a low of \$51 in Ismay, Montana's smallest town, to a high mill value of more than \$183,817 in Billings, Montana's largest city. Needless to say, low property tax mill values usually equate to modest revenues available to fund local services.

Even though Montana's municipalities derive most of their operating revenues from property tax, local governments *are not free to impose whatever amount of property tax they may wish*. Montana law [15-10-420, MCA](#) sets strict mill levy limits, some exceptions are allowed as permissive levies and others may only be exceeded by a favorable vote of the local electorate as provided in [15-10-425, MCA](#).

In addition to local property tax revenues, *resort taxes* provide an important supplementary source of local tax revenue for those resort communities that are enabled by law, [7-6-1501, MCA](#) and their local voters to impose this 3 percent sales tax on the sale of luxury goods and resort related services. In at least one of these resort communities (West Yellowstone) the resort tax generates well in excess of \$1 million per year to provide significant property tax relief and to help fund the town's aggressive capital improvements program to handle millions of visitors, as well as its yearly operations budget.

## 2. Non-Tax Revenue

In addition to the revenue derived from local taxation, municipal governments in Montana also have access to a number of additional revenue sources. These additional revenues are usually categorized as:

- *Fees for services*, primarily for municipal utilities such as water, wastewater and solid waste collection and disposal, but also for other fee supported services such as swimming pools.
- *Fines and forfeitures*, resulting primarily from traffic tickets, imposed by city courts or as forfeited bond by the offender.
- *Interest* earned on idle funds deposited in interest bearing, demand accounts and from direct investment in government securities, or in the state's pooled, Short Term Investment Program, commonly referred to as STIP.
- *Inter-governmental revenues* from the state and federal governments which include a wide range of payments directly to city governments such as federal and state grants, especially the federally-funded Community Development Block Grant (CDBG) program or Montana's Treasure Sate Endowment Program (TSEP) for infrastructure renewal. Additionally, a number of state revenue sharing programs (derived, for example, from state taxes on electronic gambling, gasoline, liquor and motor vehicles) have were consolidated into a single "entitlement distribution" to local government as a result of the enactment of HB 124 during the 2001 legislative session.

### 4.111 Municipal Debt

*(See also Section 5.2 for a more detailed analysis of the types of debt)*

The Montana constitution requires that the legislature enact laws limiting the indebtedness that may be incurred by municipal governments. Under state law, no debt may be incurred to balance a local government's annual operating budget which, as noted above, must balance proposed expenditures with cash reserves and anticipated revenues. However, state law does enable a local government to undertake *debt for long term capital improvements* such as streets and roads, government buildings and similar public facilities. (See [7-7-4101, MCA](#) for a listing of the purposes for which a municipality may incur bonded indebtedness.) The amount of debt that may be incurred by a local government is, however, limited to a specified percentage of the jurisdiction's property tax valuation. *With some exceptions, a municipality may incur debt up to 2.5% percent of the assessed value of the taxable property within the city or town ([7-7-4201, MCA](#)). Municipal debt may be further increased for construction of water and sewer systems if the revenue from these systems is devoted to servicing that additional debt ([7-7-4202, MCA](#)).*

Municipal government debt for capital improvements is most often undertaken by issuing either *general obligation (G.O.) bonds or revenue bonds*. However, in Montana smaller scale capital projects may be funded by shorter-term loans available to local governments from the state revolving loan program known as INTERCAP, operated by the Board of Investments in the Montana Department of Commerce.

#### General Obligation Bonds

General obligation (G.O.) bonds are guaranteed by the *full faith and credit* of the local government issuing the bonds. By pledging the jurisdiction's full faith and credit, the government undertakes a legally binding pledge to repay the principal and the interest by relying upon its *taxing authority*, [7-7-4204 MCA](#). This obligation must

therefore be ratified by an affirmative vote of the citizens before the bonds may be issued ([7-7-4221, MCA](#)). Due to the relative security of repayment of G.O. bond principal and interest and because the interest paid to the bond holders (lenders) *may be* exempt from state and federal taxes, lenders are usually willing to accept a lower rate of interest. As a result, the cost of the capital project will be somewhat less for the local government and for their taxpayers.

### **Revenue Bonds**

Revenue bonds, on the other hand, *are not* guaranteed by the taxing authority of the local government entity issuing the bonds and they are, therefore, somewhat less secure than G.O. bonds. Even though the bond-holders interest earnings on revenue bonds *may* also be tax exempt, the bond market will usually demand somewhat higher interest rates to attract lenders. As suggested by their name, revenue bonds are backed only by the revenues from *fees* paid by the users of the capital facility, such as a municipal water or wastewater system or Special Improvement District (SID) for neighborhood improvements such as streets and sidewalks. Because revenue bonds *do not involve a pledge of the full faith and credit (taxing authority) of the municipal government, revenue bonds do not require voter approval*, [7-7-4104](#) and [7-7-4426, MCA](#).

### **To Borrow or Not to Borrow**

Taking on local government debt by issuing either G.O. or revenue bonds involves a fairly complex process that always requires the legal competence of “bond counsel” and the marketing expertise of a brokerage firm that specializes in government bonds. Additionally, some municipal governments engage the services of a “financial advisor” to assist with the process and to represent the government’s interests in negotiating a large bond issue with a brokerage firm. However, before deciding to proceed, even before actually engaging professional consultation, it is important that the governing body understand the implications of funding a capital project with long-term debt.

- **Affordability** -We refer here not just to a municipal government’s ability to meet the monthly debt service payments while funding operations costs of the new project but, in doing so, to retain sufficient long-term liquidity to meet unforeseen, future demands on its revenues, including the effects of inflation on the costs of capital projects.
- **Competing Capital Projects** -Debt undertaken now reduces the government’s debt funding capacity (legal limit) for the life of the bonds, which is often 20 years. What other capital projects at what cost (the opportunity costs) will be required by the local government during that period? Moreover, the community’s *total debt burden must be considered*. A \$20 million school bond to upgrade the local high school proposed on the ballot at the same time as a \$10 million municipal bond proposal for a new city library are not likely to be well received by the taxpaying voters, no matter how much they may be inclined to support either one of the projects. Intergovernmental communication, coordination and cooperation among the governing bodies and executives are essential to avoid overloading the debt service capacity of the community.
- **Who Pays for Capital Project?** Long term debt financing of capital facilities means that those who will use the facility in the future, during the course of the indebtedness, will be those who pay the cost of the facility. It will be their *additional* tax dollars or fees paid to service the debt that will pay for the project. Alternatively, a capital depreciation fee built into the present tax or rate structure might be used to accumulate the capital necessary to replace the facility at the end of its useful life, thereby reducing the need for debt financing along with the attendant interest costs. In doing so, however, the present generation of users will be paying the capital costs of the facility they are now using and, by means of the capital depreciation fee included in their present tax or utility bill, they will also be paying the capital

costs of a future facility they may not need nor even have access to. In short, debt financing means that those citizens who will be using the facility will pay for the facility, which is usually sound public policy. However, in this case, sound public policy also has a fairly steep price tag, called “interest,” on the public debt.

- **Grants and Debt** -Finally, if a municipal government wishes to seek federal or state grant assistance in funding capital projects, such as Montana’s Treasure State Endowment Program (TSEP), the local government itself must demonstrate a need for the capital facility and financial need. In this regard, financial need includes a consideration of the debt capacity of the local government, which is to say the ability and willingness of that government and its taxpayers (or rate payers) to participate in funding the project by assuming its reasonable and affordable share of the costs through debt financing. Most TSEP projects are, for example, funded by a package of state and federal grants, along with a substantial debt obligation undertaken by the municipal government.

#### 4.112 Principal Statutes Related to municipal Budgeting

1. [7-6-4001, MCA](#) Local Government Budget Act
2. [7-7-4201, MCA](#) Bonded indebtedness
3. [7-7-4401, MCA](#) Municipal Revenue Bonds
- 4.

#### **Attachment 4.1 Model BARS Budget Expenditure Format**

FUND		EXPENDITURES BY ACTIVITY				City/Town/County of Municipal Model) Fiscal Year:					
Title: <u>General</u>		AND OBJECT									
Number: <u>1000</u>											
ACCOUNT NO.	ACCOUNT	Previous Year F.T. E.	Previous Year Budget	Previous Year Actual	Auth orize	(100) Personnel Services	(200---800) Operating & Maintenance	(600-699) Principal & Interest	(900) Capital Outlay	Final Budget	
420000	Public Safety										
420100	Law Enforcement	10	300,000	275,000	11	275,000	50,000		25,000	350,000	
420200	Detention and Correction										
420300	Probation and Parole										
420400	Fire Protection	.5	75,000	60,000	.5	15,000	50,000		10,000	75,000	
420500	Protective Inspections	.5	25,000	20,000	.5	15,000	10,000			25,000	
420600	Civil Defense										
420700	Other Emergency Other (List)										
<b>SUBTOTAL</b>		<b>11</b>	<b>400,000</b>	<b>355,000</b>	<b>12</b>	<b>305,000</b>	<b>110,000</b>		<b>35,000</b>	<b>450,000</b>	

**NOTES:**

1. Note increase of one Full Time Equivalent (F.T.E.) approved for next year’s budget.
2. This is a volunteer fire department in a Third City with only a full-time, paid chief whose duties are split between two- budgeted functions.
3. The blank rows are for typical county functions.

**Attachment 4.2  
Tax Levy Requirements Schedule  
Non-Voted Levies**

**City/Town/County of**  (Model of Municipal Form)

**Assessed Valuation**  650,000,000   
**Tax Valuation**  5,500,000   
**1 Mill Yields (10)**  5,500

**Fiscal Year** \_\_\_\_\_  
**Page No** \_\_\_\_\_

\*Column (3) Total Requirements must equal Column (8) Total Resources

Fund #	Fund Name	(1) Appropriation	(2) Budgeted Cash Reserve	(3)=(1)+(2) Total Requirements	(4) Cash Available (Less Current Liabilities)	(5) Non-Tax Revenues	(6)=(9)x(10) Property Tax Revenues	(7)=(5)+(6) Total Revenues	(8)=(4)+(7) Total Resources	(9)=(6)÷(10) Mill Levy	(11)=(4)-(1)+(7) Estimated Cash Balance
1000	General Fund	1,000,000	300,000	1,300,000	450,000	300,000	550,000	850,000	1,300,000	100.00	300,000
2250	Planning Board	10,000	3,000	13,000	2,000	1,000	10,000	11,000	13,000	1.82	3,000
2370	Insurance	75,000	0	75,000	1,000	4,000	70,000	74,000	75,000	12.73	0
3040	G.O. Bond (Pool)	26,000	5,000	31,000	1,000	0	30,000	30,000	31,000	5.45	5,000
7111	Police Retirement	50,000	500,000	550,000	500,000	25,000	25,000	50,000	550,000	4.55	500,000
	<b>TOTAL</b>	1,161,000	808,000	1,969,000	954,000	330,000	685,000	1,015,000	1,969,000	124.55	808,000

**NOTES:**

1. An amount up to 1/2 of the appropriation (column 1) may be budgeted as a Cash Reserve (column 2) to assure cash flow & liquidity between receipt of first and second half property tax revenues.
2. Non-tax revenues (column 5) include fines, fees, forfeitures, interest earnings and transfer payments from the state and federal governments.
3. Total Requirements (column 3) must equal Total Resources (column 8) to establish the “balanced budget” required by law.

### Attachment 4.3 Model Program/Performance Budget

<b>FUND:</b> <i>General</i> <b>FUND No:</b> <i>420500</i>	<b>DEPARTMENT:</b> <i>Fire</i>	<b>PROGRAM:</b> <i>Protective Inspections</i>
<p><b>OBJECTIVES:</b></p> <ol style="list-style-type: none"> <li>1. Conduct fire prevention inspections on 20% of all businesses in the city to achieve 100% during a five-year inspection cycle.</li> <li>2. Conduct fire prevention inspections on 100% of all schools, churches and other public assembly buildings.</li> <li>3. Conduct one 2-hour fire prevention talk and demonstration per year to each elementary school.</li> <li>4. Conduct 2 fire drills per year in each school and in all other occupied city and county buildings.</li> <li>5. Complete HAZMAT inspection training for 5 fire fighters.</li> </ol>	<p><b>ANNUAL PERFORMANCE MEASURES:</b></p> <ol style="list-style-type: none"> <li>1. Percentage of business fire inspections completed?</li> <li>2. Percentage of school/church fire inspections completed?</li> <li>3. Number of fire prevention talks/demos to schools?</li> <li>4. Number of fire drills conducted at schools and city/county buildings?</li> <li>5. Number of fire fighters trained to do HAZMAT inspections?</li> </ol>	

Budget Category	FY 2011 F.T.E.	FY 2012 Appropriation	FY 2012 Actual	FY 2013 Department Proposal	FY 2013 Proposed F.T.E.	FY 2013 Approved F.T.E.	FY 2013 Appropriation	FY 2013 Mid---Year Amendments
<b>Personnel</b>	2	100,000	95,000	150,000	3	2	95,000	
<b>Operations</b>		50,000	45,000	50,000			50,000	
<b>Capital</b>		35,000	35,000	25,000				
<b>Debt Service</b>		15,000	15,000	15,000			15,000	
<b>Inter-Fund Transfers</b>								
<b>Program Total</b>	2	200,000	190,000	240,000	3	2	160,000	

# CHAPTER V

## FINANCIAL MANAGEMENT

by

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Updated in 2019 by Chet McClean, Darla Erickson and Tara Mastel

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## 5.1 INVESTING PUBLIC FUNDS

### 5.101 Investment of Public Funds- Legal Requirements

Similar to private businesses, local governments must manage their cash. Cash management responsibilities include both cash for which there may be an immediate need as well as cash that may be invested for extended periods of time. State law provides for limits, controls and guidance concerning the local government's cash management responsibilities.

Section [7-6-201, MCA](#) requires local governments to "...deposit all public money...in solvent banks, building and loan associations, savings and loan associations, or credit unions..." Money not necessary for immediate use may be placed in savings or time deposit (CD's) or in repurchase agreements. Section [7-6-202, MCA](#) allows for the investment of public funds in direct obligations of the U.S. government including U.S. treasury bills and bonds, as well as a laundry list of other allowable investments.

Investment in money market funds is permitted only in limited circumstances. Finally, the law specifies the security necessary to ensure the safety and prompt payment of all deposits ([7-6-207, MCA](#)).

### 5.102 Investment Process- a Loser's Game

Investment of public funds can be a highly complex area of responsibility for municipal officials with little or no formal investment training or experience and it is not always clear which investments are permissible under the law. Two Attorney General's Opinions, 42 Op. Attorney Gen. No. 25 (1987) and 44 Op. Attorney Gen. No. 22 (1981), have answered some questions. However, while the Attorney General's Opinions are meant to interpret the law and add clarity, the information is still decidedly technical and difficult to understand for most officials.

It is quite common for local officials to receive phone calls from investment firm representatives promising attractive rates of return on their investments. The representative may or may not understand the investments they are trying to sell or their inherent risks. Even more likely, the investment representative will not know which types of investments are permissible for Montana local governments. Unfortunately, some finance officials have fallen victim to illusions of earning high rates of return for their taxpayers and invested public funds in risky investments that have resulted in substantial losses to their local government.

One unnamed author wrote:

Imagine the following two scenarios:

1. The city clerk-treasurer, through his/her diligent cash management efforts, increased the city's investment earnings from \$30,000 per year to \$40,000 per year; or
2. The city clerk-treasurer, in an attempt to increase the city's investment income, invested the city's funds in an illegal investment instrument. The investment is in default and it is likely the city will lose the original principal amount of \$10,000.

Which of the two preceding events would result in a headline in the local newspaper? Quite obviously, the prospect of a city or town losing money by investing in an illegal investment instrument would attract a great deal of attention in most Montana communities. Conversely, local government officials rarely receive recognition for their efforts, even when their efforts are exemplary. While we do not suggest elected officials should base investment decisions on reaction of the local media, the point is that consequences of trying to maximize the return on investments may not be worth associated risks.

### **5.103 Investment Options**

Local government officials can fulfill their cash management responsibilities without attempting to maximize the return on their investments. Simple investment options such as purchasing certificates of deposits (adequately secured) from local banks can provide safe and satisfactory rates of return.

Montana local governments also have at their disposal the expertise of highly trained and experienced investment professionals at the state level. The Board of Investments administers the Short-Term Investment Pool (STIP) for state government. State law [17-6-204, MCA](#) allows, but does not require, Montana local governments to use the pool. STIP has several advantages for local governments, including access to competitive rates of return provided by trained investment professionals, assurance the city's funds are adequately secured, and total liquidity provided by such a large investment pool. Unlike a certificate of deposit, which must be invested for a definite period of time, a local government's funds (regardless of the amount) can be deposited in STIP one day and taken out the next while earning competitive rates of return for the period the funds are on deposit.

Elected officials should take an active role in determining where the city's funds should be invested, who may make investment decisions, diversification, what investments are permissible, and the decision latitude of those responsible for investments. These decisions of the elected body can best be implemented through a formalized investment policy.

### **5.104 Investment Policy**

Many governments operate with de facto policies whereby a public official conducts investment operations in a vacuum while everybody else assumes that he or she will act responsibly. Only when something goes awry do elected officials and the press begin to question the investment policy or absence thereof.

The investment process is hardly immune from the delusion that legislation can remedy all problems, but the process is improved when elected officials act responsibly to identify objectives, assign responsibility, and address the problems of risk inherent in the investment of public funds. Conscious collective action is better than no action at all. Formal policies can result in superior performance and improved communication.

A formalized investment policy, adopted by the city council, can provide the necessary guidance to the clerk-treasurer, to ensure their investment decisions are consistent with the council's wishes. The council, through its investment policy can assign responsibility, emphasize safety first, the preservation and protection of capital, and clearly state that speculation is inappropriate in all circumstances.

Sample investment policies can be obtained from the Government Finance Officers' Association, internet searches, and other Montana local governments.

## **5.2 MANAGING PUBLIC DEBT**

### **5.201 Purpose of Debt**

Debt in a municipal government is an effective financial management tool. Active debt management provides fiscal advantages to local governments and its citizens. Debt can serve several different purposes. It is useful in

matching costs to benefits of public assets. It is useful as an economic development tool. It allows governments to build and acquire assets that would not otherwise be able to be built or acquired. Debt eliminates the need for governments to build up large reserve balances to build or acquire assets. In other words, debt is not something that should be avoided or eliminated. Rather, debt is something that should be used and managed prudently. Debt can be mismanaged, however. Over-use of debt places a burden on the financial resources of the government and its taxpayers. Thus, it is important to create policies and follow practices to ensure debt is used wisely.

## 5.202 Types of Local Government Bonds

Debt is often incurred through the issuance of bonds. There are many different types of bonds. The most common types of bonds issued by Montana local governments are described below.

### 1. General Obligation Bonds (G.O. Bonds)

State law authorizes the issuance of general obligation bonds, [7-7-42, MCA](#). A defining characteristic of general obligations bonds is that they pledge the unlimited taxing power and the full faith and credit of the issuing government to meet the required principal and interest payments. This enhanced level of security provided to investors provides the maximum safety for their investments. Because of the added security that general obligation bonds offer, issuers are able to market this type of bond at very attractive rates, in addition to being a very flexible financing instrument. Because the issuer has the ability to increase taxes to pay debt service, the structure of a G.O. bond is not constrained by a limited flow of available revenues.

General obligation bonds are normally used for projects benefiting the entire community and whose costs should be defrayed over a long period of time. State law limits general obligation debt (all outstanding and unpaid indebtedness) to 2.5 percent of assessed valuation, [7-7-4201, MCA](#).

*Voter Approval Required*, [7-7-4221, MCA](#). Whenever the governing body of any municipality considers it necessary to issue bonds pledging the general credit of the municipality for any purpose authorized by law, the question of issuing the bonds must first be submitted to the registered electors of the city or town. An election on the question of issuing bonds may be called by the city or town council or commission on its passage of the necessary resolution or after a petition asking that such election be held, and the question submitted has been presented to the council or commission. However, it is not necessary to submit to the electors the question of issuing refunding bonds to refinance bonds already issued and outstanding.

### 2. Revenue Bonds

The distinctive feature of revenue bonds is the pledge of a specific revenue stream— usually derived from the project being funded or the enterprise system of which the project is a part. The government's obligation is limited to the revenue stream(s) pledged for the repayment of the bonds. The bonds are issued without the backing of the full faith and credit of the issuing government; thus they are considered limited liability obligations. Revenue bonds are most often sold for systems that have identifiable users. For that reason, revenue bonds are considered to be a very equitable means of financing system improvements, because only the users of the system are required to pay. Financing of water, wastewater, and solid waste improvements are the most common uses of revenue bonds for Montana local governments. Revenue bonds are limited to a term of 40 years and do not require voter approval, although voter approval may be sought at the discretion of the governing body, [7-7-4432 MCA](#).

Since the use of revenue bonds is applied to self-supporting facilities, only persons directly benefiting from the services provided by the facility must bear the costs. Citizen concern is most often directed at the rates established to pay for the facility. Revenue bond debt is not subject to Montana limitations on bonded indebtedness.

Because revenue bonds are secured by a specific, limited, and usually non-tax source of revenue, they often are less secure than general obligation bonds. Underwriters will usually require the creation of a debt service reserve fund to provide additional security in the event projected receipts fall below the level needed to meet annual debt service requirements. In such cases, the debt service reserve can be used to make the required payment and give the issuer an opportunity to restore its flow of funds. The reserve fund then is replenished to its required level. The debt service reserve is often funded out of proceeds of the bond issue. To provide comfort to prospective investors, an issuer of revenue bonds must demonstrate that sufficient funds will be available to make principal and interest payments in a timely manner. This is done by offering a promise (or covenant) to maintain system rates and charges at a level that will generate revenues in excess of the required debt service payment for each period. For example, a water or sewer system may covenant to generate net revenues (gross revenues less operating and maintenance costs) available for debt service equal to at least 115 percent of annual debt service requirements. Revenue systems with less dependable revenue streams may be required to offer even higher coverage covenants. Such covenants offer the investor some assurance that fluctuations in system usage and revenues will not interfere with the timely payment of principal and interest on the bonds.

Because the repayment of revenue bonds is dependent upon the discretionary use of a facility or system, prospective investors require much more documentation and protection than is found in a G.O. bond offering. Consultants can be hired to perform a feasibility study to describe the likelihood that the system will generate revenues sufficient to meet future operating, maintenance, and debt service requirements. This is often accomplished through the city's consulting engineer. For a water and sewer system, this may be a fairly simple study that demonstrates the reasonableness of rates and the stability of the user base. For a solid-waste disposal facility, however, this study must examine the sensitivity of a much broader range of variables: How much of an impact will the proposed facility have on disposal fees? Do residents have the option of disposing solid waste elsewhere if they object to required fee increases? Will a large fee increase result in illegal dumping, thus creating another problem for government? The type of system and its sensitivity to user discretion will determine the scope and importance of the feasibility study.

### **3. Special Improvement District (SID) Bonds**

Special assessment bonds are issued to finance capital improvements that benefit taxpayers in a particular, carefully defined area of the community. Because the benefit is not enjoyed by the entire community, the justification for use of special assessments is that the cost should be borne only by those who will benefit from the improvement. Principal and interest payments are made by a special assessment on the property benefiting from improvements. The local governments use the assessment revenue to make debt service payments on the bonds. To further enhance the security for SID bonds (beyond the pledge of special assessments), the issuing agency normally pledges support of its SID revolving fund. The authority for, and restrictions on, the use of special improvement district bonds is found in [Title 7, Chapter 12, Part 41 and 42](#).

Some local governments in Montana have financed 100% of the cost of improvements to raw land. When the value of the land fell, property owners (often developers), defaulted on their assessments and the local governments were left with the associated debt (SID bonds) and insufficient assessment revenue to make the required debt service payments. These governments were required to draw upon their SID revolving fund as required by state law and the bond covenants. When this support was still insufficient to honor the bond obligations, the local governments were confronted with a decision; do we default on the bonds or levy additional taxes to meet the debt service payments? These problems have prompted some Montana governments to adopt SID policies, which serve to limit the extent to which SID bonds will be used to finance improvements—often to financing only half of the improvements to raw land. When property owners are forced

to “have more skin in the game”, the likelihood of their default is reduced considerably, as well as reducing the amount of local government’s bonded indebtedness.

### **5.203 Refunding Bonds**

Refunding bonds are issued to retire an already outstanding bond, perhaps to shorten the term of the bond issue, take advantage of more favorable interest rates, eliminate restrictive covenants, reorganize the maturity schedule, or consolidate the community's debt. Generally, issuers want to replace outstanding higher interest rate bonds with lower interest rate obligations and, in some cases, to modify or remove restrictive conditions in existing bond covenants.

In many cases, bonds are not callable for a number of years. Through advanced refunding, refunding bonds are issued and the proceeds are placed in escrow pending their application to the redemption of the outstanding bonds on the first call date. Thus, the advance refunding procedure enables local governments to refund existing debt before the bonds are callable.

Refunding bonds offer the opportunity for flexibility in modifying the debt structure of the community. They are not subject to debt limitations and a bond election is not required. Generally, any bond that can be legally issued can be legally refunded. The issuing agency will save interest expenses by issuing new lower-yield bonds to pay off higher-yield bonds; however, cost savings must be significant enough to offset the accompanying administrative costs.

### **5.204 Bond Ratings**

Bond ratings reflect the relative strength of the government’s financial management and planning capabilities, the quality of its elected and administrative leadership, as well as its wealth and social characteristics. Bond ratings serve as a statement of a locality’s economic, financial and managerial condition and represent the business community’s assessment of the investment quality of a local government. Highly-rated bonds are more competitive in the market and thereby help lower interest costs paid by residents. High-grade ratings reduce the cost of raising capital for projects, and create a substantial savings for the taxpayers.

The cost of obtaining a bond rating must be weighed against the anticipated benefits (reduced interest rates) in order to determine whether or not the local government should have their bonds rated. General obligation bonds are the most likely type of bonds to be rated, while SID bonds are rarely rated.

## **5.3 ACCOUNTING**

### **5.301 Accounting Principles**

Montana local governments are required to manage and account for their financial activities in accordance with Generally Accepted Accounting Principles (GAAP), as set forth by the Governmental Accounting Standards Board (GASB) ([2-7-504 MCA](#), [2.4.401](#) and [2.4.411 A.R.M](#)). GASB is the recognized authority with respect to governmental accounting. Managing the local government’s finances in accordance with GAAP and with the rules set forth by GASB, provides the citizens assurance that their public funds are being accounted for in a proper manner. Compliance with GASB’s standards is enforced through the audit process, when auditors render an opinion on

the fairness of the financial statement presentations in conformity with GAAP.

The information needs of the users of government financial statements are different from the needs of the users of private company financial statements. A government's performance cannot be assessed by profit, which is the main objective of businesses. Governments have objectives other than profit maximization. Therefore, governments need accounting principles and reporting systems that differ from those of businesses.

### 5.302 Basis of Accounting

Basis of accounting determines when transactions are recognized. Under an *accrual basis*, an expenditure is recognized when a bill is incurred, whereas on a cash basis, the expenditure is recognized when the bill is paid. Most local governments maintain accounting records for general governmental operations on a modified accrual basis, with revenues recorded when available and measurable, and expenditures recorded when services or goods are received, and liabilities incurred. Accounting records for enterprise funds are maintained on an accrual basis, with all revenues recorded when earned and expenses recorded at the time liabilities are incurred, without regard to receipt or payment of cash.

Local governments maintain their accounts in accordance to the principle of *fund accounting* to ensure that limitations and restrictions on available resources are observed and adhered to. Fund accounting classifies resources into funds or account groups with respect to the intended activities or objectives specified by those resources for accounting controls and financial reporting purposes. Governments use several funds to account for their resources and activities.

**Fund** is a fiscal and accounting entity with a self-balancing set of accounts for recording cash and other financial resources, together with all related liabilities and residual equities or balances, and changes therein, which are segregated for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions, or limitations. The most common reason for establishing a fund is to separately account for restricted-use revenue or to comply with state or federal law.

There is no limit to the number of funds that a government may establish and maintain for accounting and financial reporting. A generally-practiced governmental accounting guideline is that a government should use the smallest number of individual funds as possible, consistent with its particular circumstances, and that individual funds are closed when the intended purpose no longer exists.

**Account** is an organizational or budgetary breakdown which is found within the government's funds. Each department serves a specific function as a distinct organizational unit of government within the given fund. Its primary purpose is organizational and budgetary accountability. An example of an account is public safety - for the police department. Additional sub-numbers can be used to further classify the account such as the detective division within the police department.

**Object of expenditure** refers to specific, detailed expenditure classification. It relates to a specific type of item purchased or service obtained. Examples of objects of expenditure include salaries, supplies, purchased/contracted services, capital outlay and travel.

### 5.303 Types of Government Funds

Most general-purpose governments engage in three broad categories of activities:

- **Governmental** activities are those financed predominantly through taxes and intergovernmental grants commonly referred to as non-exchange transactions.
- **Business-type** activities are those financed predominantly through user charges.
- **Fiduciary** activities are those for which the government acts as a trustee or agent for individuals, external organizations, or other governments.

All of the government's funds fall within these three categories. Examples of each follow:

1. **Governmental funds** are those through which most governmental functions are financed. The following are examples of governmental funds
  - **General fund** — accounts for all financial resources except those required to be accounted for in another fund. The General Fund is the government's primary operating fund.
  - **Special revenue funds** — account for the proceeds of specific revenue sources that are legally restricted by an outside third party to expenditures for specified purposes (other than for major capital projects). Examples include: state and federal grants, gas tax, street maintenance district, tree maintenance district, etc.
  - **Capital project funds** - account for financial resources to be used for the acquisition or construction of major capital facilities (other than those financed by proprietary funds.) Examples include: City Hall renovation, police station construction, etc.
  - **Debt service funds** - account for the accumulation of resources for and the payment of, principal and interest on general long-term debt. Examples include: city hall debt repayment, police station debt repayment, etc.
2. **Proprietary Funds** are used to account for the business---type activities of a government—those that are similar to activities carried out in the private sector. There are two types of proprietary funds:
  - **Enterprise Funds** — account for operations that are financed and operated in a manner similar to private business enterprises, where the intent of the governing body is that the costs (expenses, including depreciation) of providing goods or services to the general public on a continuing basis be financed or recovered primarily through user charges; or where the governing body has decided that periodic determination of revenues earned, expenses incurred, and/or net income is appropriate for capital maintenance, public policy, management control, accountability, or other purposes. Enterprise funds include: water, wastewater and solid waste.
  - **Internal Service Funds** — account used to account for business---type activities in which the customers are other government departments or agencies.
3. **Fiduciary Funds** are used to account for resources held by the government but that are intended to benefit parties other than the government itself. There are two types of fiduciary funds.
  - **Trust Funds** — are used to account for assets that the government holds as a trustee for the benefit of parties other than the government itself.
  - **Agency Funds** —are generally used to account for assets that a government temporarily holds as an agent for other parties.

## 5.4 CLAIMS FOR PAYMENT

### 5.401 The Claims Process

Montana law [7-6-4301, MCA](#) requires that all claims for payment by a city or town must be presented to the council for approval in an itemized format within one (1) year from the date the claim accrued.

Payment of claims against a city or town may be authorized by the council when:

- payee-signed claims have been issued to the city or town and the payee has attested in the claim to its accuracy and that the payee has not received the claimed amount; or
- the payee has provided the city or town with an invoice or other document identifying the quantity and total cost for each item included on the invoice.

All bills, claims, accounts, or charges for materials of any kind that are purchased by and on behalf of a city or town by its department heads or officers must be reviewed by the city or town finance director or the city or town clerk before submission to the council.

### 5.402 Liability for False Claims

Montana Code Annotated [7-6-4311](#) provides that:

- A person who knowingly presents or causes to be presented a false, fictitious, or fraudulent claim for allowance or payment to any city or town or its contractors forfeits the claim, including any portion that may be legitimate, and in addition is subject to a penalty of not to exceed \$2,000 plus double the damages sustained by the city or town as a result of the false claim, including all legal costs.
- The forfeiture and the penalty may be claimed in the same suit.

### 5.403 Claim Forms to Detect Fraudulent Claims

An effective internal control to provide a complete paper trail to account for disbursements and thus detect fraudulent claims against the city or town is the use of a properly designed *claim form*. A model to implement policy and a claim form follow this page.

**Attachment 5.1  
Model Claims Policy**

RESOLUTION NO: \_\_\_\_\_

**A RESOLUTION OF THE CITY/TOWN COUNCIL OF THE CITY/TOWN OF \_\_\_\_\_, MONTANA, ESTABLISHING A POLICY CONCERNING THE PROCESSING OF ALL CLAIMS FOR PAYMENT AGAINST THE CITY/TOWN, CREATING A STANDARD CLAIM FORM AND ESTABLISHING CERTAIN INTERNAL CONTROLS FOR PURCHASES AND DISBURSEMENTS.**

**WHEREAS**, Montana law [7-6-4301, MCA](#) requires the establishment of certain procedures and internal controls to ensure that public funds are lawfully disbursed; and

**WHEREAS**, the \_\_\_\_\_ City/Town Council desires to ensure that all purchases made by city/town employees are duly authorized and that all goods and services purchased are, in fact, received by the city/town and that no disbursement of city/town funds is made without final approval by the mayor and city/town council; and

**WHEREAS**, the Mayor of \_\_\_\_\_ desires to establish business-like procedures for ordering, receiving and paying for only those goods and services actually required for the safe and efficient operation of all city/town departments and the efficient delivery of essential city/town services.

**NOW THEREFORE BE IT RESOLVED** by the City/Town Council of City/Town of \_\_\_\_\_, Montana that:

**Section 1.** It is the policy of the City/Town of \_\_\_\_\_ that:

1. All disbursements of city/town funds, except for payroll, shall be documented with a city/town Claim Form, a copy of which is included as attachment to this resolution. Said Claim Form shall include:
  - a. specific approval of the purchase by a designated city/town official;
  - b. the signed certification of the vendor verifying that the claim for payment is true and correct and that payment has not been previously received by the vendor;
  - c. certification by a designated city/town official that the purchased goods or services have, in fact, been received by the city/town, and
  - d. that the city/town council has approved the claim for payment pursuant to law.
    - i. Disbursements to be made pursuant to an existing contract that has been approved by the city/town council do not require completion of Section III, "Vendor Certification" of the Claim Form. However, the purpose and date of the contract (*e.g. MMIA insurance assessment, June 30, 2019*) must be entered in Section II of the Claim Form and all other sections of the form must be completed.
    - ii. Copies of all completed Claim Forms with original signatures shall be filed sequentially by date that the claim was approved for payment by the city/town council. A new and separate file shall be initiated for each fiscal year such that any disbursement of city/town funds may be readily cross checked with the minutes of the city/town council meeting at which the claim for payment was approved by the city/town council.
    - iii. Claim Forms are public records and shall be retained for not less than five years following the official audit conducted for the fiscal year in which the Claim Form was approved for payment. Claims associated with a contract must be retained for a period of not less than eight years.

2. The specific written approval of the mayor of the city/town of \_\_\_\_\_ shall be required prior to the purchase or agreement to purchase any good or service that costs more than \$1,000. Section I of the Claim Form may be used to record such approval.

3. Any vehicle or item of equipment, machinery, construction, repairs or professional services with a cost in excess of \$80,000 must follow the bid process established by law [7-5-4302, MCA](#). Purchases of less than \$80,000 but in excess of \$10,000 should be considered for a bid process, which may be waived by the mayor with council approval.

4. All claims must be signed by two city/town employees attesting to the fact that the goods or services have been received by the city/town.

**Section 2.** It is the policy of the City/Town of \_\_\_\_\_ that:

1. No employee of the city/town of \_\_\_\_\_ shall have any pecuniary interest in or benefit from any contract or purchase agreement entered into by the city/town nor shall any city/town official contract with or purchase goods or services from any firm or business enterprise that is owned by a city/town employee or close relative of a city/town employee.
2. No City/Town employee shall receive any commission, profit, gratuity or gift as a result of any contract or purchase made by the city/town.
3. A waiver of the provisions of Section 2(1) and 2(2) above can only be granted if approved by the affirmative vote of a majority of the city/town Council before the purchase or contract has been entered into by a city/town employee.

**Effective Date**

**Section3.** This resolution shall be in full force and effect immediately upon approval by the city/town Council.

**References:**

[7-6-4301, MCA](#) and [2-2-1, MCA](#), "Code of Ethics" Montana Code Annotated.

**PASSED AND ADOPTED** by the City/Town Council of \_\_\_\_\_ the City/Town of \_\_\_\_\_, Montana at a regular session thereof held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**ATTEST:**

\_\_\_\_\_  
City/Town Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

## Attachment 5.2 City/Town Model Claim Form

CITY/TOWN OF \_\_\_\_\_, MONTANA

*Must be completed prior to all disbursements other than payroll pursuant to [7-6-4301, MCA](#). Attach vendor invoice or receipt*

I. Vendor Information:			
Pay To: (Name and address)	Total:		
Taxpayer ID Number*:	<i>*The City/Town must have an invoice or receipt and the TIN or SSN of the vendor before this claim will be processed.</i>		
Date of Purchase:			
For Department:			
Approved By*:	<i>*Mayor's signature required for all purchases in excess of \$1,000.</i>		
II. Goods or Services Purchased:			
Description of Goods or Services Purchased*:			
<i>*Include Serial Number of Equipment. Invoices may be attached in lieu of descriptions.</i>			
III. Vendor's Certification:			
I, the undersigned, do solemnly swear that I am the vendor or vendor's agent of the above described Goods or Services and that the amount claimed is wholly unpaid and is a true and lawful claim against the City/Town of _____.			
Signature of Vendor:	Date:		
IV. Certification by City/Town Officials That Goods or Services Have Been Received by the City/Town of _____:			
<i>I, (signature)_____do hereby certify that the Goods or Services described above have been received by the City/Town of _____.</i>			
<i>I, (signature)_____do hereby certify that the Goods or Services described above have been received by the City/Town of _____.</i>			
V. Approval by City/Town Council:			
The above described claim for payment has been reviewed by the City/Town Clerk-Treasurer and was submitted to and approved by the _____ City/Town Council meeting in regular/special session on _____.			
Signature of City/Town Clerk-Treasurer:	Date:		
VI. Accounting:			
Fund Name	Account Code	Date Booked	Check Number

## 5.5 THE AUDIT

### 5.501 Purpose of an Audit

For many of us, the thought of an audit strikes a feeling of fear. We become fraught with images of an Internal Revenue Agent with beady eyes, sporting a dark three-piece suit, auditing our last tax return to determine if we owe additional income taxes. Despite our worries, an audit of our local government should be welcomed rather than feared. Unlike an audit we may undergo as individuals, an audit of our local government has an entirely different purpose. The objectives of an audit of our local government include:

1. Are the government's financial statements fairly presented in accordance with Generally Accepted Accounting Principles?
2. Did the government comply with applicable laws and regulations?
3. Does the government have an adequate system of internal controls?

The auditor's primary objective is to *determine if the government's financial statements are fairly presented*. A favorable opinion does not mean that the government's financial statements are free of errors. The term fairly presented means that the financial statements are not so materially misstated or misleading that they do not present fairly the government's financial information. The auditor's conclusions are presented as an opinion, rather than a statement of absolute fact or guarantee. Despite this lack of certainty, government officials should welcome an audit, look forward to passing all of the auditor's tests, and gain assurance that the government's financial records are reasonably accurate.

Governmental audits are often referred to as "*financial and compliance*" audits because governmental auditing standards require auditors to test both financial and compliance requirements. The financial portion of the audit is meant to determine if the financial statements are fairly presented in accordance with accounting standards. The compliance portion of the audit refers to whether the government followed applicable laws and regulations. A listing (a "Compliance Supplement") of many [city/town's compliance requirements can be found on the Montana Department of Administration's website](http://sfsd.mt.gov/LGSB/Audit-Financial-Review-Resources/4_ComplianceSupplement) [http://sfsd.mt.gov/LGSB/Audit-Financial-Review-Resources/4\\_ComplianceSupplement](http://sfsd.mt.gov/LGSB/Audit-Financial-Review-Resources/4_ComplianceSupplement).

Auditors are required by their auditing standards to evaluate the government's system of *internal controls*. Internal controls (also referred to as a system of checks and balances) are intended to provide reasonable, but not absolute, assurance that the government's assets are protected. Guaranteed protection is impossible. Segregation of duties is one of the most powerful aspects of internal control. The overriding principle is: *no one person should ever be placed in a situation to carry out or conceal an error or irregularity without timely detection by others in the normal course of their responsibilities*.

Many mistakenly believe that an audit is designed to detect fraud, if it exists. This is simply not the case. While the detection of fraud could possibly be an outcome of an audit, fraud is rarely detected by an audit. The system of checks and balances that governments implement serve to prevent these problems from occurring, which is obviously far better than discovering problems after the fact through an audit or other means. Governing bodies are responsible for ensuring auditor's recommendations for improvements in internal controls are implemented and should also consider an even stricter system of checks and balances than the auditors may recommend. Many audit firms will provide specialized engagements at a reasonable cost designed solely for the purpose of improving a government's system of internal controls. Given the public's expectation of a frugal and efficient government, it

is difficult for elected officials to expend additional money to prevent problems, when most feel no problems exist. However, there are a multitude of government officials who have experienced fraud and embezzlement and have wished they had expended a relatively small amount of money to improve their system of internal controls. Problems of this nature, regardless of severity, serve to erode the public's trust in government.

### 5.502 Auditor Selection

State law [7-5-4301, MCA](#) exempts professional services (including audit services) from bidding requirements.

[Section 2.4.407 of the Administrative Rules of Montana](#) enumerates a series of criteria that local governments must consider in the selection of an audit firm. These criteria are:

1. Listing on department's roster of independent auditors authorized to conduct local government audits;
2. Independence, as defined by applicable auditing standards;
3. Demonstrated understanding of the work to be performed;
4. Technical experience of the independent auditor in conducting similar types of local government entity audits;
5. Qualifications of staff to be assigned to the audit;
6. Work history of the independent auditor; and
7. The proposed audit fees.

Typically, local governments seek proposals from audit firms that are interested in performing their audit. This is generally done through a Request for Proposal (RFP) process. Sample RFP's can be obtained from several sources, including major Montana cities, internet searches, and the Government Finance Officers' Association (GFOA). Regardless of the RFP form used, the contents must address the auditor selection criteria stated above. Once the government selects an audit firm, an audit contract, lasting up to three consecutive fiscal years, is required in a form prescribed by the Department of Administration.

State law does not require an RFP and it is not uncommon for local governments to renew their audit contracts without seeking new proposals. A level of efficiency may be gained by utilizing the same audit firm for multiple years, since the auditors are familiar with the local government, their staff, and accounting system.

### 5.503 Auditor's Opinion

The audit culminates in an auditor's opinion on the government's financial statements. The auditor's opinion is generally no more than a sentence or two long and is embodied in a letter to the government officials entitled Independent Auditor's Report. All governments seek to obtain an "Unqualified Opinion" also referred to as a clean opinion. A clean opinion means that the government's financial statements are fairly stated in all material respects in relation to the financial statements taken as a whole. It basically means that the auditors did not find any errors that were so significant and their effect so great, as to cause the government's financial statements to be misleading.

Most governments are able to receive an unmodified opinion. There are times, however, when a government may receive a modified opinion. This may be due to an accounting requirement that the government failed to implement. Or, it could be that the government's financial records are inaccurate or misleading. In these instances, the auditors may issue a modified opinion. Their choices consist of: an adverse opinion (do not present fairly), a disclaimer of opinion (decline to give an opinion), or a qualified opinion (fairly presented, except for). Which of these opinions an auditor may issue revolves around the auditor's judgment and is dependent upon

facts and circumstances. If a governmental entity receives anything other than an unmodified (clean) opinion, immediate steps should be taken to correct the problem.

### **5.504 Actions by Governing Bodies**

Section [2-7-515, MCA](#) requires the governing bodies of each audited local government entity to review the contents of the audit within 30 days and to notify the department in writing as to what action they plan to take on any deficiencies or recommendations contained in the audit report. The local government entity shall adopt measures to correct the report findings and submit a copy of the corrective action plan to the Department of Administration.

### **5.505 Importance of Audited Financial Statements**

Frequently, the audit report is viewed by the city council and staff as highly technical and serving only the needs of higher authorities. All too often, once the audit report is received, it is placed on the shelf with the audits of all prior years and begins to gather dust. However, the information contained in the audit report is imperative to obtaining an accurate picture of the government's financial wellbeing.

For example, auditors routinely adjust the government's financial information when preparing the audited financial statements. The adjustments generally fall into two categories: adjustments due to erroneous misstatements and adjustments due to intentional misstatements. Erroneous misstatements are likely the result of accident. Intentional misstatements, on the other hand, are the result of willful decisions, such as choosing not to apply an accounting standard or attempting to conceal fraudulent activities. In either case, by having the financial statements verified by an independent, external party, the audited financial statements should present information that is more faithfully representative of the actual financial position of the government.

Furthermore, the audited financial statements present the ideal opportunity for the clerk-treasurer to perform his/her annual financial trend monitoring. It is also an ideal time for the council members to educate themselves on the formal financial statements of their government, becoming aware of any emerging trends and improving their understanding of the "big picture" of their local government's finances.

## **5.6 FINANCIAL TREND MONITORING**

### **5.601 Importance of Financial Analysis**

Perhaps the most important responsibility of a local government's finance professional, other than the preparation of the budget, is financial analysis. Financial analysis can encompass many areas. Our focus here is financial analysis designed to determine the financial health of the local government, if it is getting better or worse, and identify emerging trends the council should be addressing. Unfortunately, this highly critical area of responsibility is often neglected or simply not performed at all. If a local government's clerk-treasurer or city/town council is not fully aware of the municipality's financial health, does not know if its financial health is getting better or worse, and is unable to identify emerging trends affecting its financial health, who is in control? This lack of attention to one of the most important responsibilities of the local finance official can cause problems ranging from unexpected budget problems to actual insolvency.

## 5.602 What to Analyze

A local government's financial trend monitoring system can be wide-ranging and cover a multitude of variables or it can be quite simple. Simple monitoring systems can be very effective, especially for small governmental entities. At a minimum, the clerk-treasurer should establish a formalized annual monitoring system of the financial position of its major funds. This analysis will assist the clerk-treasurer in understanding the "big picture" of his/her government's finances and will act as an early warning mechanism for emerging problems. Financial trend monitoring books are available and provide examples of the many kinds of analyses that can be performed. However, once the local finance professional is able to master monitoring of the city's financial position, monitoring of other variables becomes increasingly easy and is just an extension of the same principles.

The financial position of a local government is best measured by what accountants call fund balance. Fund balance is defined as the assets of a fund (primarily cash & accounts receivable) less liabilities of a fund (primarily accounts payable). In other words, fund balance essentially means the net worth of a fund at any given point in time- typically at the end of the fiscal year. However, the trend of the financial position of a fund is much more important than its absolute value, thus, setting up the need for a multi-year trend analysis.

The term fund balance applies only to governmental funds, which includes the city's general fund, special revenue funds, debt service funds, and capital project funds. Accounting requirements for the city's proprietary funds (enterprise funds) are different and so is the financial analysis that is needed for these funds. The best measure of the financial position of an enterprise fund is working capital. Working capital is defined as the current assets (primarily cash & accounts receivable) of the fund, less current liabilities (primarily accounts payable) of the fund. Current means due within one year. Therefore, a wastewater system's physical plant would be excluded from the calculation as would the associated debt (bonds payable) of the wastewater plant. The end result is the fund's liquid net worth. The city's audited financial statements will separately identify the current assets of an enterprise fund as well as the current liabilities, making this analysis relatively easy.

In lieu of evaluating fund balance and working capital levels, some local governments (primarily smaller units), opt for a simpler approach- that is simply monitoring cash balances. While analyzing cash balances may occasionally omit some critical information, such as a large payment the government is due or a large disbursement that just occurred after year-end, the simple monitoring of each fund's cash balance can provide the smaller local governments with an effective alternative to evaluating fund and working capital balances. Regardless of the approach, it is critically important that the clerk-treasurer perform a financial trend analysis of its entity's financial position on an annual basis, develop a multi-year trend analysis and regularly present this information to the city council. This information is absolutely critical to an elected official's understanding and management of the city or town's finances.

Once the financial analysis is performed and any unwanted or danger trends are revealed, the next step is to identify the primary causes of the changes in financial position. For example, fund balance in the general fund could be declining for three or four years in a row. The fact that fund balance is declining does not automatically indicate a problem. The government could be making a concerted effort to repair or replace needed equipment, fully understanding the impact on its general fund. Assuming the government has adequate reserve levels; this situation does not necessarily indicate an impending problem. The reason is that the expenditures causing the decline in fund balance levels can easily be eliminated in subsequent years. On the other hand, fund balance in the general fund could be declining due to increased on-going/recurring costs, which poses an entirely different situation, resulting in a structural imbalance in the budget.

## 5.603 Structural Balance

Staff members from New York City wrote about what they termed “Structural Balance”. The author describes structural balance as: *“the situation in which the structure of the revenue budget and the structure of the expenditure budget are sufficiently complementary: of similar size and growth rate over time.”* In other words, the ongoing revenues of a fund should be able to support the on-going expenditures of a fund. One-time expenditures are not part of a structural balance analysis, nor are one-time revenue sources. For example, it would be prudent for a city council to add a new police car to its fleet with a one-time \$40,000 revenue source. In a subsequent year, when the revenue disappears, the city simply eliminates that capital purchase. Imagine, however, the consequences of a city council adding a new *police officer* with this same one-time revenue source. The budget will balance in the first year, but what will happen in subsequent years? Quite simply, the government would unknowingly place its general fund in a state of structural imbalance. On-going revenues will not support on-going expenditures, setting up the council for a budget that is out-of-balance.

Structural balance sounds logical, simple and easy to understand, so why would such an easy concept require the publication of an extensive paper? Only someone intimately familiar with public budgeting can fully appreciate the concept of structural balance and the full range of implications. When crafting a government budget, the finance professional deals with literally hundreds, if not thousands of variables. Each of these variables can affect the city’s finances in different ways. Some variables are clearly one-time revenues or one-time expenditures. Just as often, however, many of the variables fall into a gray area, not fitting neatly into either the one-time or the on-going category. Combine these complexities with the sheer volume of issues and data inherent in the budgeting process and the simple concept of structural balance becomes lost. Structural balance must be at the forefront of the finance professional’s thought process and most importantly, throughout the development of the budget.

Furthermore, it is difficult to take one budget in isolation and determine if it is structurally balanced or not-giving rise to a multi-year trend analysis, as described above. A structurally balanced budget or financial plan may produce surpluses in some years and deficits in others. The term deficit implies something is awry. However, there will undeniably be times when reserve levels will decline (i.e. the expenditures of a fund will exceed the revenues of a fund), causing a deficit for that particular year. The key is in knowing what is causing a reduction in a fund’s financial position and to be able to take action, if necessary, to remedy the situation in a timely manner. A financial structure that is balanced at one point in time can become unbalanced when underlying circumstances change.

## 5.604 Concepts and Definitions

### ***Revenue Structure***

The revenue structure of a budget is described by the types of revenues, their shares in the total budget, and the reliability and rapidness with which different revenues grow over time.

A structure dominated by tax revenue, for example, creates a strong dependence between city revenues and health of the local economy. When the economy turns down, tax revenues may not keep pace and expenditures that were affordable during strong economic growth will be insupportable in economic recession.

On average, local governments around the nation raise about 40 percent of their revenues from taxes and about 25 percent from user fines, fees, and charges. Their reliance on federal and state aid averages 35 percent. There are important merits to a tax-dominated structure:

- A tax system, as opposed to a fee-based system, separates the use of public services from the ability of users to pay for those services.
- A tax-based system can place a relatively greater financial burden on prosperous citizens in order to lessen the financial burden of government on poor citizens.
- A tax system can match or exceed the growth of an expanding economy.
- Unfortunately, this structure succeeds in balancing budgets only in strong economic expansions. When the economy slows down, taxes slow down, but social services expenditures generally accelerate.

### **Tax Structure**

The link between the tax structure and the local economy is critical in determining the level of government expenditures that can be supported. In general terms, one can characterize a tax structure by dividing it into *income-based taxes, sales and consumption taxes, and real property taxes.*

1. **Income-based taxes**, which include personal and business income taxes, are typically the most sensitive to the economy and will exhibit strong growth in economic expansions and sharp slowdowns in economic recessions.
2. **Sales and consumption taxes** generally show less volatility, yet still accelerate and slow down as the economy rises and falls.
3. **Real property taxes**, which in general grow at a fairly steady rate in both expansions and contractions, show the least responsiveness to the local economy.

Local governments typically raise about 75 percent of their tax revenues from the real property tax, about 20 percent from sales and consumption taxes, and the remainder from income taxes.

In a period of sharp economic expansion, this traditional structure will show limited acceleration in growth. If the growth in the economy creates strong demands for growth in expenditures, this revenue structure will create sizeable budget pressures. On the other hand, in a period of economic decline, this revenue structure will show a very limited decrease.

Obviously, complete stability is not the sole desirable characteristic of a revenue structure. The ability to grow with the economy, low cost of collection, and reasonable assurance that poor taxpayers do not bear a disproportionate share of the tax burden are also important. A predominantly stable expenditure structure with a volatile tax structure is prone to substantial deficits in economic recessions.

### **Expenditure Structure**

The structure of the expenditure side of the budget is a characterization of the types of services that are produced. What types of spending grow faster than the economy and what types grow more slowly? Personnel costs for police, fire, corrections, and sanitation are services commonly provided by local governments and may be loosely characterized as "fundamental" local services that citizens expect to receive routinely wherever they live. A further refinement of the data might add water and sewer spending, emergency medical services, and possibly some portions of public hospital services or transportation services, among others. Debt service includes interest and principal for city general obligation short-term and long-term debt.

### **Structural Balance**

Structural balance describes the situation in which the structure of the revenue budget and the structure of the expenditure budget are sufficiently complementary; of similar size and growth rate over time. Without structural balance, deficits will persist and will overwhelm any surpluses created in years of exceptional economic strength.

Since budgets must balance each year, structural deficits will often be financed with nonrecurring revenues or deferrals of expenses, which are not part of the structure of the budget and therefore do not contribute to restoring structural balance. To the extent that temporary or non-recurring revenues or expenditure savings are used to restore recurring expenses, however, the financial plan will not be structurally balanced and the re-established service levels will not be sustainable over time. Therefore, budget-balancing efforts like those that merely slipped costs would not be considered restructuring of expenditures or revenues.

Structural balance can be restored only by changing the revenue structure so that recurring revenues are larger and/or grow more rapidly over time, or by changing the expenditure structure so that recurring expenditures are smaller and/or grow more slowly over time. In the past, expenditures have been restructured by changing the types of services that the city provides, such as scaling back on capital spending or shifting some social services expenses to the state or federal government.

### **5.605 Critical Factors in Creating and Maintaining Structural Balance**

Structural balance is a moving target that requires continual re-evaluation and high-level attention on a permanent basis. Sustained effort, or stability in basic services, means avoiding not only sharp spending reductions during economic downturns but also sharp expansions when the economy is growing rapidly, and tax revenues are yielding budget surpluses.

To achieve such stability requires a meticulous approach to financial planning and fiscal management, and the ability to restrain spending and set aside surpluses in good times for use in maintaining basic services in difficult times.

#### ***Sustaining Multi-Year Plans***

One of the most difficult tasks in governmental fiscal management is sustaining a multi-year plan. The demand for services will always exceed the ability to provide these services so that there is a constant competition for resources. Multi-year plans are also difficult to sustain because they are effectuated by a budget appropriation process that deals with just one year at a time. A multi-year undertaking that is initiated in one adopted budget could be canceled in any successive adopted budget. Thus, legally the financial commitment has at most a one-year horizon. The inherent difficulty of sustaining financial commitments over a multi-year framework is, of course, compounded when elections change the council or the administration changes.

#### ***Avoiding Overexpansion***

Overexpansion during periods of strong economic growth is one of the primary causes of structural imbalance and therefore must be avoided. The difficulty is that, in an urban environment with strong demands for services, avoiding expansion beyond the sustainable financial capacity of the revenue structure means that some service demands must be denied even when current funding is available. The reason is that new, recurrent spending can be funded for only that brief time in which the local economy is at its maximum growth over the business cycle. When that growth tapers off, the tax revenues supporting that spending will quickly disappear.

If overexpansion is inevitable, several factors could make it less consequential. The first would be a well-defined sense of basic fundamental services that should be provided at all points in the business cycle versus optional services that will be temporarily provided during flush times and jettisoned during declines. The second would be a well-developed contingency planning process that incorporated plans to expand temporarily when unanticipated funds materialized as well as plans to contract temporarily when anticipated funds failed to materialize. The third would be a well-developed stabilization reserve or rainy-day fund that accumulated revenues in each year of expansion for use in years of contraction or other mechanisms to stabilize finances.

### ***Adequate Funding of Stabilization Reserves***

Once a balanced structure of revenues and expenditures is established, the structure must be preserved during economic declines. As a result, funding must be available to support basic expenditures without the need to change the revenue structure. The amount of funding that would be adequate to achieve this stability is difficult to establish but certain parameters are clear. Money set aside in a stabilization fund must be utilized to maintain the basic expenditure structure during an economic downturn, not to sustain overexpansion as the downturn begins to emerge.

### **5.606 Purpose of Fund Balance and Working Capital**

As previously described, fund balance and working capital are the best measures of a fund's financial position for governmental funds and enterprise funds, respectively. A fund's financial position basically reflects the net available resources of a fund. It is necessary for governments to maintain adequate levels of available resources (also referred to as reserves) in their funds for a variety of reasons. Reserves, act like a shock absorber, guarding against unforeseen events. Listed below are the primary reasons governments need to maintain reserves in their operating funds:

- To mitigate revenue shortfalls.
- To mitigate unanticipated expenditures.
- To ensure stable tax rates.
- To assist in long-term financial planning.
- Cash flow purposes.
- Equipment acquisition and replacement.
- Credit rating agencies monitor fund balance & working capital levels to evaluate a government's continued creditworthiness. The result of their analysis is often reflected in their bond ratings.

As described by the Government Finance Officers' Association, those interested primarily in a government's creditworthiness or economic condition (e.g., rating agencies) are likely to favor increased levels of fund balance. Opposing pressures often come from unions, taxpayers and citizens' groups, which may view high levels of fund balance as "excessive."

### **5.607 What Level of Fund Balance Should be Maintained?**

If a government is going to evaluate its financial position, the natural question is, what should the city's financial position be? There is no right or wrong answer to this question. Furthermore, the answer is dependent upon the fund in question, the type of revenues of the fund, the type of expenditures of the fund, and a sense of the local government's future needs.

State law [7-6-4034\(2\)\(b\) MCA](#) places a limit on the amount of reserve a city may budget for its tax supported funds equal to 50% of the total amount appropriated and authorized to be spent from the fund during the current fiscal year. Therefore, if the city council appropriates \$500,000 from its general fund, the maximum balance the city may include in its general fund budget is \$250,000.

Some simple principles will assist the finance professional and the city council with gauging whether or not they have adequate reserve levels. The higher the volatility of a fund's revenues or expenditures, the higher the reserve levels are prudent. Conversely, the more stable the revenues and expenditures of a fund, the less reserve levels are needed. Higher reserve levels are needed for enterprise funds, due to the fact that they are infrastructure intense. Infrastructure needs are not only costly, but generally they are sporadic as well, thus resulting in wide swings in the financial position of enterprise funds, requiring higher peaks (and possibly lower troughs) in the reserve levels. Funds that are personnel intense (those consisting primarily of city staff), require a lesser reserve level, because of the stability and predictability of the expenditures. As a general rule, the city's general fund will consist mainly of personnel and the principal revenue source will be property taxes, both of which are highly predictable.

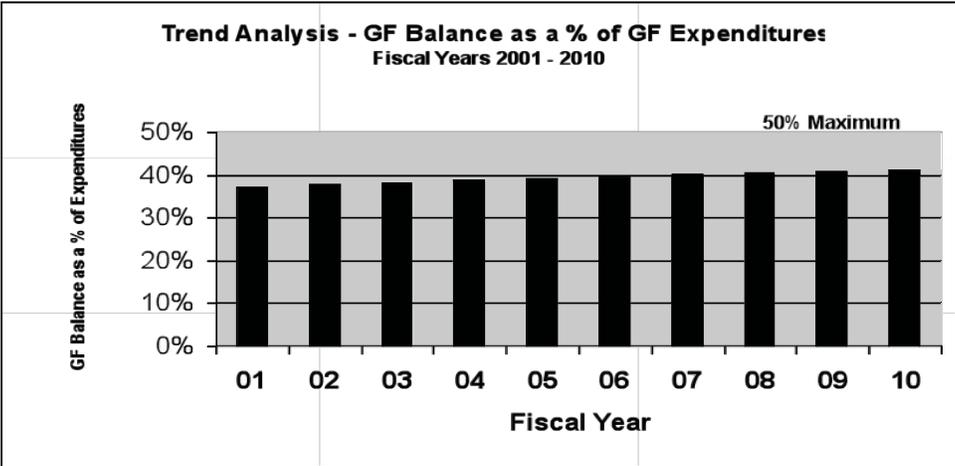
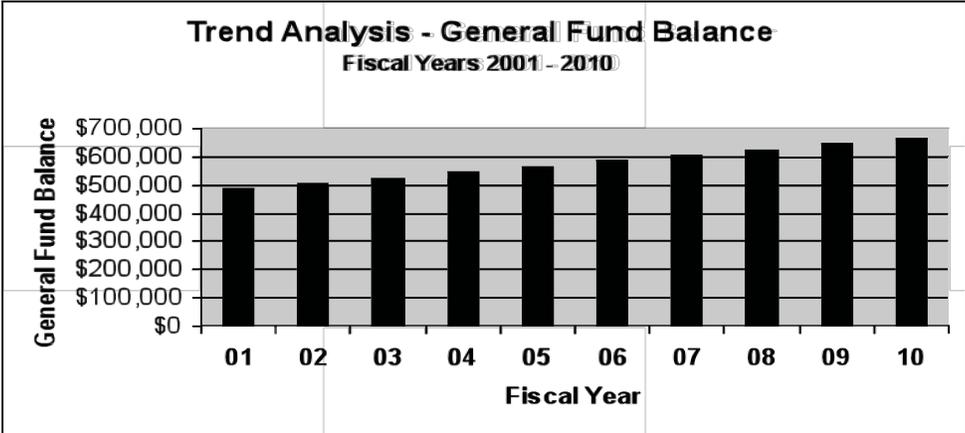
As stated previously, the trend of a fund's financial position is much more important than the absolute value. The key element in managing the city's financial position is to ensure future revenue sources are sufficient to adequately fund future expenditure needs and to do so with a minimum amount of disruption to normal operations. A well-managed city will have a very good understanding of the volatility or stability of its revenue and expenditures in each of its funds, as well as a good understanding of its future capital needs. A Capital Improvement Plan is one of the very best ways of addressing these responsibilities.

The Government Finance Officers' Association (GFOA) routinely disseminates recommended practices to local government finance officers. The GFOA prepared a recommended practice on the level of general fund reserves in 2002 and 2009 and stated that the adequacy of unreserved fund balance be assessed based on a government's own specific circumstances. That being said, the GFOA went on to recommend that:

*"...governments maintain an unreserved fund balance in their general fund of no less than two months of regular general fund operating revenues or regular general fund operating expenditures... A government's particular situation often may require a level of unrestricted fund balance in the general fund significantly in excess of this recommended minimum level."*

Comparisons with other cities and towns can also provide a useful analysis to gauge the adequacy of a city or town's general fund reserves. The level of general fund balance can be stated as a percentage of general fund expenditures, thus allowing comparisons to any city, regardless of size. However, because of similarities in tax structure and services offered, it is most useful to compare fund balance levels with other Montana cities of similar size or possibly look to some of the larger cities for guidance.

### Attachment 5.3 Model Financial Trend Monitoring Graphs



# CHAPTER VI

## MUNICIPAL PROPERTY AND CONTRACTS

by  
Kenneth L. Weaver, Ph.D.

### **6.1 Real and Personal Property**

- 6.101 Municipal Property Defined
- 6.102 Authority for a Municipality to Acquire, Own and Dispose of Property
- 6.103 Acquiring Personal Property
- 6.104 Cooperative Acquisition and Use of Personal Property
- 6.105 Disposing of Personal Property
- 6.106 Acquiring Real Property by Purchase or Gift
- 6.107 Acquiring Real Property by Eminent Domain
- 6.108 Disposing of Real Property

### **6.2 Municipal Contracts**

- 6.201 Authority to Enter Into and Execute Contracts



## 6.1 REAL AND PERSONAL PROPERTY

### 6.101 Municipal Property Defined

For most municipal purposes there are two classes of tangible property: “real property” and “personal property.” *Real property includes land and whatever buildings, or structures (appurtenances) are affixed to land and whatever is growing upon the land, [70-1-106, MCA](#). Personal property is, in general, all property other than real property and includes, among other tangible things, a municipality’s capital equipment, as discussed below.*

### 6.102 Authority for a Municipality to Acquire, Own and Dispose of Property

Montana law [7-1-4124, MCA](#) delegates broad authority to municipalities to: “buy, sell, mortgage, rent, lease, hold, manage, or dispose of any interest in *real or personal property*.”

However, there are a number of legally required procedures that must be followed in acquiring or disposing of municipal property. These procedures are identified and described below for the more common transactions involving municipal property.

### 6.103 Acquiring Personal Property

Most personal property, such as operating equipment (fire engines, police cruisers, office equipment and construction equipment, etc.) is acquired by a city or town by means of a purchase transaction. However, the law requires that if the equipment (or materials or supplies) cost *more than \$80,000, purchase must be by means of advertised, competitive bid, [7-5-4302, MCA](#).*

The procedures for *purchasing property by bid* are set forth explicitly in the statute, as follows:

- The advertisement must be published as provided in [7-1-4127, MCA](#), and the second publication must be made not less than 5 days or more than 12 days before the consideration of bids. If the advertisement is made by posting, 15 days must elapse, including the day of posting, between the time of the posting of the advertisement and the day set for considering bids.
- The council may:
  - a) Postpone awarding a contract until the next regular meetings after bids are received in response to the advertisement;
  - b) Reject any or all bids; and
  - c) Re-advertise as provided in this section.
- Exceptions to the required bid procedure include purchases made under specified emergency circumstances and *with the approval of a three-fourths majority of the council present*. Additionally, a bid process is not required when purchasing equipment or supplies from a government agency at a substantial savings to the city or town, [7-5-4303, MCA](#). Finally, the Attorney General has held that municipalities may purchase goods and services through cooperative purchasing with the state as set forth in Title 18. (51 A.G. Op. 15 (2002)).
- The terms of a contract for purchase of property that extends for a period of *five years or more must be submitted to the voters, [7-5-4304, MCA](#).*
- When the amount to be paid under an *installment purchase contract* exceeds \$4,000, the council may provide for the payment of the amount in installments extending over a period of not more than 10 years, [7-5-4306, MCA](#).
- In lieu of soliciting bids, the council may *purchase at public auction* any vehicle, machinery,

appliances, apparatus, building, or materials and supplies for which must be paid a sum of \$50,000 or less, [7-5-4310, MCA](#).

In addition to the purchase of property, a city or town may also acquire real or personal property as a *gift, grant, donation or bequest*. However, such property shall be administered and *used by the city or town for the particular purpose* for which the same was given, donated, granted, devised, or bequeathed. In the event no particular purpose is mentioned in such gift, donation, grant, devise, or bequest, then the same shall be used for the general support, maintenance, or improvement of the city or town, [7-8-103, MCA](#).

#### 6.104 Interlocal Agreements to Acquire and Use Goods and Services

Montana law [7-11-102, MCA](#) enables municipal governments to cooperate with other local government units to provide services and facilities more efficiently than would otherwise be possible. By means of an *interlocal agreement* the details of the cooperative undertaking are reduced to writing in the form of a contract, the required contents of which are set forth in detail in [7-11-105, MCA](#). State law directs that interlocal agreements must be filed with the county clerk and recorder and the office of the Montana Secretary of State, [7-11-107, MCA](#).

An example of a long-standing and successful interlocal agreement to acquire and cooperatively share the use of expensive equipment is provided by the cooperating cities of Conrad and Shelby. Colstrip also utilizes shared service agreements with the Colstrip School District and the Colstrip Park District to the benefit of their taxpayers.

#### 6.105 Disposing of Property

A city or town council may sell, dispose of, or lease any property belonging to the city or town by adoption of an ordinance or resolution *passed by a two-thirds vote of all the members of the council*, [7-8-4201, MCA](#).

Old supplies or equipment may be sold by the city or town to the *highest responsible bidder after calling for bid purchasers* as herein set forth for bid sellers, and such city or town may trade in supplies or old equipment on new supplies or equipment at such bid price as will result in the lowest net price, [7-5-4307, MCA](#). A city or town may *trade* with or purchase from any county or political subdivision any property without an appraisal of the property, [7-8-101\(3\)\(b\), MCA](#).

The legal requirements imposed upon sale of municipal property are less stringent than on the sale of property by a county government. In the interests of caution or in highly controversial circumstances, a municipality may wish to follow the procedures legally required of county governments in the sale of personal municipal property:

- The sale of any personal property with a value greater than \$2,500 would be preceded by a competent appraisal of the fair market value of the property.

Property with a value greater than \$2,500 would be sold at public auction noticed as provided at [7-1-4127, MCA](#). If no acceptable bid is received at the public auction, the council could instead approve a private sale of the property at no less than 70 percent of the appraised value of the property.

*Municipal property should not be sold to officials or employees of the municipal government except at a properly noticed public auction*, [2-2-104](#) and [7-5-4109, MCA](#), to avoid the potential for a real or perceived conflict of interest.

### 6.106 Acquiring Real Property by Purchase or Gift

A municipal government may also acquire real property by purchasing it from the owner or by receiving it as a gift, grant donation or bequest. Again, in the interests of caution or in highly controversial circumstances, a municipality may wish to follow the procedures legally required of county governments in the acquisition of real property.

- Real property with a value in excess of \$20,000 *may not be purchased unless it has been previously appraised by a disinterested “certified general real estate appraiser” or three disinterested citizens of the county appointed by the district judge.*
- The government *may not pay more than the appraised value* for the real property.

If real property is to be received as a gift, grant donation or bequest, the real property must be administered and *used for the particular purpose* for which the property was given, donated, granted, devised, or bequeathed. In the event no particular purpose is mentioned in such gift, donation, grant, devise, or bequest, then the property shall be used for the general support, maintenance, or improvement of the city or town, [7-8-103, MCA](#).

### 6.107 Acquiring Real Property by Eminent Domain

Montana law [7-5-4106, MCA](#) enables municipal governments to condemn private property for certain public purposes, which are enumerated in [70-30-102, MCA](#). The legal processes required of a city or town government to exercise its power of eminent domain are set forth in numerous sections of law depending upon the public purpose to be served by the taking of private property. Hence, a review of the legally sufficient purposes and processes required for the lawful exercise of a municipality’s power of eminent domain are beyond the scope of this handbook and require the involvement of experienced legal counsel.

### 6.108 Disposing of Real Property

A city or town council may sell, dispose of, or lease any property belonging to the city or town by adoption of an ordinance or resolution *passed by a two-thirds vote of all the members of the council*, [7-8-4201, MCA](#). However, if the property is held in trust for a specific purpose, (such as a cemetery or park land) the sale or lease must be *approved by a majority vote of the electors of the municipality* voting at an election called for that purpose. The election must be held in conjunction with a regular or primary election.

Although subsection [\(7-8-4201\(2\)\(a\), MCA](#) requires a two-thirds vote of the city commission to sell city land, *a city with self-governing powers may enact a superseding ordinance allowing the sale of city land by a simple majority vote* [43 A.G. Op. 41 (1989)]. “After analyzing subsection (2)(b) of this section, the Attorney General applied the same analysis and conclusion to allow the governing body of a *local government unit with self-governing powers to enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose.*” [43 A.G. Op. 55 (1990)].

***Prudent municipal officials will seek a review and interpretation by the city attorney of this A.G. Opinion before proceeding with the sale of real property held in trust by a city or town.***

If a city or town owns property containing a historically significant building or monument, the city or town may sell or give the property to nonprofit organizations or groups that agree to restore or preserve the property, [7-8-4201\(3\), MCA](#). The contract for the transfer of the property must contain a provision that requires the property to be preserved in its present or restored state upon any subsequent transfer; and

provides for the reversion of the property to the city or town for noncompliance with conditions attached to the transfer.

As is the case in the sale of personal property by a municipality, the legal requirements imposed upon sale of municipal real property are less stringent than on the sale of real property by a county government. However, in certain circumstances, a municipality may wish to observe the procedures legally required of county governments in the sale of personal property set forth above in the sale of municipal real property, as well.

## 6.2 MUNICIPAL CONTRACTS

### 6.201 Authority to Enter Into and Execute Contracts

A city or town is authorized to make any contracts necessary to carry into effect the applicable powers granted by this chapter and to provide for the manner of executing the contracts [7-1-4124\(4\)](#) and [7-5-4301,MCA](#).

All municipal contracts for goods or services should be drafted by the city attorney for review and approval by the city or town council prior to execution by the mayor or chief executive

As detailed in Section 6.103, a contract for the purchase of any automobile, truck, other vehicle, road machinery, other machinery, apparatus, appliances, equipment, or materials or supplies for construction, repair, or maintenance in excess of \$80,000 must be given to the lowest responsible bidder after advertisement for bids. A public work or construction project may not be divided into multiple contracts or separate work orders in an attempt to circumvent the competitive bidding requirements, [7-5-4305, MCA](#). Energy performance contracts and the solicitation and award of an investment grade energy audit are exempt from these competitive bidding requirements, [7-5-4315, MCA](#).

With certain limited exceptions, a contract for services must not extend beyond five years [7-5-4304,MCA](#). Printing contracts must be let annually, [7-5-4108, MCA](#).

The mayor, any member of the council, any city or town officer, or any relative or employee of an enumerated officer may not be directly or indirectly interested in the profits of any contract entered into by the council while the officer is or was in office. The requirements that must be met to waive this prohibition are set forth in detail at [7-5-4109, MCA](#).

# CHAPTER VII

## CITIZEN PARTICIPATION AND INTERACTION

By

Paul R. Lachapelle, Ph.D.

### **7.1 Citizen Participation and Interaction**

7.101 Representing the Community: Trustees vs. Instructed Delegates

7.102 Political parties

7.103 Interest Groups

7.104 Neighborhood Politics

7.105 Community Councils

7.106 Community Surveys

7.107 Focus Groups



## 7.1 CITIZEN PARTICIPATION AND INTERACTION

As a municipal elected official, your responsibility is to represent and act on behalf of not only a constituency but also the community as a whole. With this responsibility comes the task of knowing how to interact with the public effectively and how to actively promote citizen participation. This chapter provides an overview of techniques and theories for dealing with the public including background on representing the community, political parties and interest groups, neighborhood politics, and use of community surveys and related sampling techniques. Providing for effective citizen participation and interaction is not only in your interest as a municipal official, but it's a fundamental principal of good democratic governance.

### 7.101 Representing the Community: Trustees vs. Instructed Delegates

An interesting issue that any elected official will face is how to represent various citizens and their interests within a community. Often, the choice that an official is faced with involves acting as a *trustee* or as an *instructed delegate*. The concept was originally defined by the 18th century British statesman Edmund Burke who explained that legislators should act as trustees according to their "enlightened conscience" and should not sacrifice their "mature judgment" to the wishes of their constituents.

The *trustee* makes decisions based on their sense of right and wrong and what they believe will be in the best interest of the public as a whole. Generally, the decision takes into consideration both the present and the future with a focus on the long-term implications of an action. Because of personal experience or professional background, the elected official may have knowledge of certain facts that define a policy question and thus may better understand the costs and consequences of a decision than a majority of his or her constituents. Consequently, an official may be obliged to a higher standard of accountability in advancing the public interest in the face of competing private interests and irrespective of re-election consequences.

Alternatively, an *instructed delegate* votes and makes his/her decisions based on the majority of one's constituents, or the people that voted for him/her. The instructed delegate acts as an agent of the voters and thus will reflect the will of the majority of the representative's constituents. Under these circumstances, the official will base decisions on what the voters want even if the official does not agree and irrespective of what is in the public's interest. This decision-making strategy will not satisfy the interests of all the citizens nor necessarily meet the fundamental needs of the community but it will probably facilitate reelection of the municipal official.

The arguments for and against the "instructed delegate" and "trustee" decision-making strategies have been pondered by political philosophers for centuries with little improvement since Burke first formulated the options. Today, however, experienced representatives seem to understand that, on a great many minor issues and on some not-so-minor issues, they may be able to respond as an "instructed delegate" to the demands of their constituents. At other times and on other issues, the well-being of the community requires that the representative transcend the wishes of even a large majority of constituents and vote, instead, for his or her understanding of the public's interest and, in doing so, risk losing the esteem as well as the votes of his or her own constituency. The reality is that no elected official serving his or her community as a member of the governing body wants to vote against the will of a majority of the community. He or she will do so and vote as a "trustee" of their community's well-being only under the most clear and urgent circumstances and not always even then.

## 7.102 Political Parties

A political party can be thought of as a political organization with an expressed ideology that seeks to attain and maintain power within government. This vision of the political party is often bolstered by a written platform with specific goals. Often parties are formed from a coalition of disparate interests.

There can be either partisan or nonpartisan elections in municipalities across Montana. This decision is dependent on the form of local government and type of election chosen (see [7-3-219](#) and [314, MCA](#), for more information). If a partisan election is the election process used, officials will determine which political party is most appropriate given their personal views and future political plans. All of Montana's 129 incorporated municipalities conduct partisan elections for their mayor and council members.

In most Montana communities, partisan politics have relatively little to do with local policy issues, let alone the revenue and service delivery problems that confront local officials. At the local level, few elected officials would argue that party affiliation is at all relevant to local policy-making beyond providing party identification on the ballot at election time. As one experienced mayor observed, "Potholes don't wear party labels!"

Do political parties make a difference in Montana's local electoral politics? Survey work conducted by the Local Government Center of mayors and council members showed the majority of those sampled reported political party affiliation had little or no influence on their policy decisions or election. In nonpartisan municipal elections, name recognition frequently seems to be the decisive advantage.

Whether a municipal election is on a partisan or nonpartisan ballot, the role of political parties in the general election of Montana's local officials is relatively minor, as compared to the important role that local political parties continue to play in the election of state and national officials. No doubt there are still municipalities where this general characterization is less than accurate.

Because most municipal elections are nonpartisan, the county election administrator may ***waive the requirement for a primary election*** if:

- the number of candidates for an office exceeds three times the number to be elected to that office in no more than one-half of the offices on the ballot; and
- the number of candidates in excess of three times the number to be elected is not more than one for any office on the ballot, [13-14-115, MCA](#).

If an election administrator determines that a nonpartisan primary election need not be held, the election administrator must notify the governing body, which may require that a primary election be held if it passes a resolution not more than 10 days after the close of candidate filing. For more information or clarification on this statute, contact the Montana Secretary of State's office at (406)444-5376 or visit [the Montana Secretary of State website](#).

## 7.103 Interest Groups

Interest groups are generally made up by individuals who act for the benefit of larger groups of people and who are linked by common concerns, values, and preferences. These individuals act in concert to influence the decisions of government to advance shared interests. In Montana's local political arena, the term would include such diverse entities as a neighborhood advisory council, the parent-teacher association, trade unions, a main street business association, or Chamber of Commerce.

Some observers of the Montana political scene have argued that interest groups are a problem that complicates the search for solutions to the many difficult policy issues confronting Montana government at both the state and local level. Others believe that these groups provide an effective method of what Wiseman (1966) calls “interest articulation,” defined as the process by which members of the public express their needs to a local government. Interest articulation can range from personal contact with government officials to the development of formal interest groups. Interest articulation can have different outcomes in different situations and can include lobbying, peaceful protest, phone calls, and letters to policymakers.

According to Almond (1958) there are generally four types of interest groups:

1. Anomic groups that are often spontaneous groups with a collective response to a particular frustration,
2. Non-associational groups that are rarely well-organized and their activity is dependent upon the issue at hand,
3. Institutional groups that are formal and have some political or social function in addition to the particular interest and,
4. Associational groups that are formed specifically to represent an issue of a particular group.

In general, political influence in Montana’s local politics is fairly widely-dispersed among competing interest groups and is not concentrated in political parties nor in narrowly based political, social or economic elites. While there are, no doubt, a few exceptions to this general proposition, especially where the prevailing political party or a corporate giant holds sway, the elected officials in most of Montana’s municipal governments are obliged to sort out the competing interests brought to the governing body by a wide range of groups and individuals, each seeking its own best interests.

Regardless, interest groups provide local governments with two purposes; they can either serve as a restraint with a type of veto power over an action or decision, or they can provide an amplifying effect and provide legitimacy to policy decisions.

### **7.104 Neighborhood Politics**

One type of interest group is a neighborhood advisory council, or residential community associations, or other more informal neighborhood group with the potential to influence local governments. Neighborhood political groups, such as residential community associations have experienced phenomenal growth in recent years with great potential power and influence in local government regarding community services, housing policy, and land use planning (Dilger, 1992). Knowledge of and proactive interaction with these specific interest groups can provide for more effective government functioning as well as legitimizing policy decisions.

### **7.105 Community Councils**

Community councils are one method of formally sanctioning citizen participation in local government. These councils may be authorized to provide citizens the opportunity to advise a city council on any number of issues (see [7-3-223](#), [7-3-317](#), [7-3-417](#) and [7-3-516, MCA](#)). While not common across the Montana municipal government landscape, these councils can perform such functions as providing detailed information on a particular neighborhood problem, or researching and advising a solution to a pressing land use issue. Community councils are advisory only and thus do not take away the authority of the local government official.

### 7.106 Community Surveys

There are many methods of understanding community opinions and attitudes about a specific policy decision, whether past or pending. The method of surveying depends on financial resources, the timeline to complete the work, the size of the population to be studied, available personnel, and expertise in survey work. While there are many costs associated with community surveys, there is also great benefit including measuring community satisfaction on a particular topic, confirming what may be already known anecdotally, or as a means of educating both local government officials and the citizenry themselves.

Community surveys often sample only a fraction of a total population. A sample is a representative part of a larger group (be it a neighborhood, ward, or entire municipality) whose opinions or attitudes are studied to gain information about the whole. A survey of the entire population (called a census) is often impractical and unnecessary since, if done correctly, statistical inference can generalize the results of a small sample to a larger population.

To begin a community survey, a survey instrument must first be developed. Use of citizens in the development of this survey can be integral to both the validity of the questions asked as well as a sense of ownership that citizens may feel over the survey process. Survey instruments can take many forms and depend on the sampling technique to be used but include door-to-door canvassing using a written questionnaire, on-line survey for those with an internet connection, mail-back questionnaires, or telephone sampling. Each of these techniques has costs and benefits depending on the objective of the survey, sample size, and available resources.

With proper training, citizens can also assist with sampling, further legitimating the survey process. Officials should be familiar with sampling techniques or contract the survey work to experts before authorizing citizens to conduct survey work. Critical to a successful survey is minimizing the margin of error, defined as the amount of random sampling error in the survey results. The larger the margin of error, the less faith one should have that the reported results closely represent the entire population.

In addition to community surveys, city officials may use a number of other techniques to engage citizens in open and informed conversations about policy issues. This current era marks a more deliberative democratic turn taking place in local governments across the United States. Various deliberative forums are structured in many ways including citizen juries, electronic town hall meetings, national issues forums, and neighborhood conversations all involving two key elements of deliberative democracy; objective background information and a structured environment for discussing an issue (Cavalier 2009).

### 7.107 Focus Groups

Another effective means to engage the public is the use of focus groups. A focus group is a structured discussion with pre-selected individuals that is intended to collect information or gauge public opinion on a specific policy issue or idea. Focus groups are traditionally used in market research to determine consumer's opinions of products or services but are increasingly used in local government settings to provide a deliberative venue for learning, trust-building, creative problem solving, and ultimately as a way for citizens to influence policy or to educate government officials. The group is led by an impartial facilitator, using someone outside of local government. Focus groups typically involve a small assembly of individuals (usually numbering between 5 and 15) based on their relationship to an issue and representation of community demographic characteristics.

A focus group may provide insightful understanding of complex issues and situations which cannot be gathered from standard surveys or large public meetings. Focus groups also provide an opportunity for individuals to

express their views in detail, to hear the opinions of others, and to collectively develop resolutions to problems. Both technical and anecdotal information can be presented and debated, which can lead to creative problem-solving and broad community support for a potential local government action. Perhaps most importantly, a successful focus group can enhance and support the work of local government officials.

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## **CHAPTER VIII**

### **LAND USE AND PLANNING LAW IN MONTANA**

by

James Caniglia, Wyeth Friday, AICP, Kelly A. Lynch, JD, AICP and Allison Mouch, AICP

#### **8.1 Authority for Making Local Land Use Decisions**

- 8.101 Police Power
- 8.102 General and Self-governing Powers
- 8.103 Montana Land Use Statutes
- 8.104 Federal Pre-emption
- 8.105 Legislative v. Quasi-judicial Decisions
- 8.106 Decision-makers

#### **8.2 Growth Policies**

- 8.201 Purpose
- 8.202 Required Content
- 8.203 Option Content and Neighborhood Plans
- 8.204 Procedure for Adoption and Amendment

#### **8.3 Zoning**

- 8.301 Types of Zoning
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#### **8.4 Subdivisions**

- 8.401 Local Authority and the Montana Subdivision and Platting Act
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- 8.403 Definition of Subdivision and Division of Land
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- 8.405 Local Subdivision Regulations
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#### **8.5 Buildings for Lease or Rent**

- 8.501 Local Regulations
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- 8.503 Review Process and Timelines



## 8.1 AUTHORITY FOR MAKING LOCAL LAND USE DECISIONS

### 8.101 Police Power

A state and local jurisdiction's authority for enacting local land use regulations, applying them to real property within a jurisdiction, and enforcing them against property owners rests in the police power. As such, the states and local jurisdictions may adopt and enforce land use ordinances and regulations that further the public health, safety, morals, and general welfare of the community. (*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Freeman v. Board of Adjustment*, 97 Mont. 342, 352 (1934)).

*"The concept of the public welfare is broad and inclusive... the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled" (Berman v. Parker, 348 U.S. 26, 32-33 (1954)).*

### 8.102 General and Self-governing Powers

In Montana, the extent of a municipality's authority to adopt land use regulations depends on whether it has adopted a self-governing charter or is a general government power. *Self-governing powers* may exercise any power, provide any services, or perform any functions not expressly prohibited by the constitution, law, or charter, [Mont. Const., Art. XI, Section 6](#) and [7-1-101, MCA](#). Montana's 127 municipalities have self-governing powers (*See Chapter I, Table 1.4*). Where statutes provide the framework for specific actions, self-governing powers must strictly follow those requirements; where discretion is required, self-governing powers must substantially comply with the statute (*Gregg v. Whitefish City Council*, 2004 MT 262, P20 (2004)). An example of express prohibition in Montana state law is the regulation of the location of foster homes, youth homes, and community residential facilities serving eight or fewer persons. Under state law, all local governments must consider such uses a residential use, and allow them in all residential zones, [76-2-412, MCA](#). (See also [76-2-302, MCA](#), creating a state-imposed rebuttable presumption that manufactured housing will not affect property values in residentially zoned districts of Montana's municipalities.)

*General governing powers* have only those powers provided or implied by law ([Mont. Const., Art. XI, Section 4\(1\)](#); *D & F Sanitation Serv. v. Billings*, 219 Mont. 437, 444-445 (Mont. 1986)). Unless the state legislature specifically provides local governments with general government authority to take a particular action, provide a particular service, perform a particular function, etc., a general government municipality has no authority to act. An example of a lack of specific authority to adopt land use regulations was impact fees, prior to the enactment of a state statute in 2005 specifically authorizing the adoption of such fees by local governments (*See Southwest Montana Building Industry Association v. Bozeman*, 2000 Mont. Dist. LEXIS 2670 (2001)).

### 8.103 Montana Land Use Statutes

Montana law specifically provides municipalities with the authority to adopt a specific statutory framework for a variety of land use and planning regulations:

- Growth policies [76-1-601, et seq., MCA](#),
- Zoning ordinances for municipal zoning [Title 76-2-Part 3](#)
- Subdivision regulations [Title 76, chapter 3](#)

- Floodplain regulations [76-5-301, MCA](#)
- Buildings for lease or rent regulations [76-8-101, et seq., MCA](#)
- Impact fees [7-6-1601, et seq., MCA](#)
- Annexation policies and plans [7-2 Parts 42-48, MCA](#)
- Urban renewal plans [7-15 Part 42, MCA](#)

### 8.104 Federal Pre-emption

In some cases, the federal government regulates a particular land use or activity, and therefore states and local jurisdictions are prohibited from regulating the matter themselves. In order for federal law to pre-empt state or local regulations, the federal statute must either expressly preempt state regulation in the field, or state law must conflict with the operation or objectives of federal law (*California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987)). In such cases, local regulations that do not conflict with the objectives of the federal regulations, and do not stand as an obstacle to them, may still be a lawful enforcement of local government police power. An example of such regulation is the federal Telecommunications Act of 1996. While the Act allows local jurisdictions to regulate the location and construction of wireless facilities, it prohibits the local jurisdiction from regulating the placement of the facility on the basis of the environmental effects of radio frequency transmissions (47 U.S.C. § 332(c)(7)).

### 8.105 Legislative v. Quasi-judicial Decisions

The local governing body makes both legislative decisions and quasi-judicial decisions, and the standards and procedures for each are different. Legislative decisions establish rules, policies, or standards of general applicability in a community. Examples in Montana include the adoption or amendment of a growth policy, subdivision regulations, a zoning ordinance, or a zoning map. Legislative acts are “presumed to be valid and reasonable,” and will be upheld unless the decision “is so lacking in fact and foundation” that “it is clearly unreasonable and constitutes an abuse of discretion” (*Schanz v. City of Billings* (1979), 182 Mont. 328, 335; *Lake County First v. Polson City Council*, 2009 MT 322, P34- P37 (2009)). The “Court does not sit as a super-legislature or super-zoning board” (*Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, P14 (2009)).

Quasi-judicial decisions apply legislative rules, policies, or standards to one or more particular properties. An example of a quasi-judicial decision is the review and approval or denial of a subdivision application. Courts will review quasi-judicial decisions to determine “whether the record establishes that ... [the governing body] acted arbitrarily, capriciously or unlawfully” (*MM&I, LLC v. Gallatin County*, 2010 MT 274, P29 (2010)).

Almost all legislative and quasi-judicial decisions to adopt and enforce land use regulations in Montana communities are decided by the local elected governing body. In most jurisdictions, that body is the city-commission or council. Commissions range in size from three to six or more councilpersons or commissioners (Butte-Silver Bow and Missoula each have 12) and a mayor (sometimes manager or executive officer). However, there are other boards and committees provided for in state law that play important roles in the land use planning process in Montana.

### 8.106 Decision Makers

**Zoning Commission** – Each municipality is required to appoint a Zoning Commission which is responsible for making recommendations to the governing body regarding zoning regulations and zoning maps, [76-2-307, MCA](#). Municipalities may authorize a city-county planning board to function as the zoning commission, [76-1-108, MCA](#).

**Planning Board** – State law also authorizes municipalities to create a Planning Board, an appointed advisory body created by the municipality to serve in an advisory capacity on land use and planning issues to the local decision-makers [76-1-102, MCA](#). The statute requires the municipality’s governing body to notify the county of their intent to create a planning board, which gives the county the opportunity to elect to form a city-county planning board, [76-1-105, MCA](#). A city-county planning board can also be asked to function as the municipality’s zoning commission, [76-1-108, MCA](#). Whichever type of board is formed, the planning board is required to prepare a growth policy upon request by the municipality’s governing body, and may propose policies for subdivisions and subdivision standards. While planning boards are not required, if a city council has created a planning board, it must seek the advice of the planning board in the review of all subdivision applications (although it may delegate that responsibility to staff in the case of minor subdivisions, [76-1-107, MCA](#)). Some municipalities have elected to consolidate existing city, county, or city-county planning boards in order to function as a combined board, [76-1-112, MCA](#). In some municipalities, planning boards are also expected to review amendments to subdivision regulations, transportation plans, other community plans and provide recommendations to the governing body.

**Board of Adjustments** – Finally, municipalities may appoint a Board of Adjustment to take action on variances and other special exceptions to the terms of the local zoning ordinance ([76-2-321, MCA](#)), hear appeals from administrative decisions ([76-2-323, MCA](#)), and provide a forum for public comment on a governmental agency’s proposal to use land contrary to local zoning regulations ([76-2-402, MCA](#)). The Board of Adjustment must consist of at least five and not more than seven members, [76-2-322, MCA](#). As opposed to a planning board, a Board of Adjustment has decision-making authority delegated to it by the governing body. The municipality may delegate all, some, or no authority to the Board of Adjustment in this regard, [76-2-321\(2\), MCA](#). Final decisions made by the Board of Adjustments are directly appealable to the district court, [76-2-327, MCA](#).

The state statutes set forth the requirements for the memberships, terms, duties, and procedures of each of these bodies, and their roles are explained in more detail under each of the specific land use regulations discussed in this chapter. In all cases, a municipality’s planning staff, attorney, public works staff, and other staff members handle ministerial or administrative land use decisions, ensure application review and decision timelines and procedures are met, and provide the evidentiary support for a local governing body’s decision on land use matters.

## 8.2 GROWTH POLICIES

### 8.201 Purpose

In land use planning, the long-range comprehensive plan for a community serves as the “blueprint” for how its residents would like to see development occur over a future time period. The comprehensive planning document sets forth the goals, objectives, policies, and implementation strategy for all aspects of development in the community, including land use, population, housing, transportation, economic conditions, natural resources, public services and facilities, public safety, parks and recreation, or community character. In Montana, this comprehensive planning document is called the growth policy. (*Citizen Advocates for a Livable Missoula, Inc. v. City Council*, 2006 MT 47, P20 (2006)).

In 2003, the state statute was modified to make the growth policy an optional, non-regulatory document, [76-1-605\(2\), MCA](#); Chapter 599, Laws 2003. Under this language, local jurisdictions are not required to have a growth policy. If a jurisdiction does adopt a growth policy, that document does not confer any authority on a local jurisdiction to regulate “that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.” In particular, the statute prohibits a governing body from denying or imposing conditions on a land use approval based solely on the fact that the development proposal does not comply with the growth policy. That

does not mean that a municipality may disregard its growth policy (Heffernan v. Missoula City Council, 2011 MT 91, P77 (2011)). The governing body must substantially comply with the growth policy in adopting and implementing regulations like zoning and considering proposed land uses (Heffernan v. Missoula City Council, 2011 MT 91, P78 (2011)). A growth policy itself may acquire legal force if a municipality adopts a law or regulation implementing the goals and objectives therein. (Flathead Citizens for Quality Growth, Inc. v. Flathead County Board. of Adjustment, 2008 MT 1, P49 (Mont. 2008).

## 8.202 Required Content

If a local jurisdiction decides to prepare a growth policy, it must follow the state requirements for content and process. The statute requires the growth policy to identify existing conditions and projected trends in each of eight areas ([76-1-601\(3\)\(b\), \(c\), and \(d\), MCA](#))

1. Land use
2. Population
3. Housing needs
4. Economic conditions
5. Local services
6. Public facilities
7. Natural resources and
8. Sand and gravel resources.

Local jurisdictions are allowed to add other characteristics, features, or elements to the growth policy, [76-1-601\(5\), MCA](#). The growth policy must include an implementation strategy for development, maintenance, and replacement of public infrastructure, and a timetable for implementing the goals and objections set forth in the plan, [76-1-601\(e\) and \(f\), MCA](#). While there is no particular requirement for how far into the future a growth policy must forecast, the statute does require the jurisdiction to identify a timetable for reviewing the policy every 5 years, [76-1-601\(f\)\(iii\), MCA](#).

Growth policies must also contain an evaluation of the potential for fire and wildland fire in the jurisdictional area, which may require the jurisdiction to delineate the wildland-urban interface (colloquially referred to as the “WUI”) and adopt regulations to protect structures within the WUI, [76-1-601\(3\)\(j\), MCA](#). Within the growth policy, the jurisdiction must define the primary criteria for reviewing subdivisions within the jurisdiction, set forth how the governing body will evaluate and make decisions regarding those criteria, and how it will conduct public hearings on proposed subdivisions, [76-1-601\(3\)\(h\) and \(i\), MCA](#). The governing body must also describe how it will coordinate and cooperate with other jurisdictions in the area on the matters within the growth policy, [76-1-601\(3\)\(g\), MCA](#).

## 8.203 Optional Content and Neighborhood Plans

In addition to the minimum requirements set forth in the statute, growth policies may also contain additional information, policies, goals, or objectives of the community, [76-1-601\(4\), MCA](#). For instance, the growth policy may contain an infrastructure plan to help the community project infrastructure needs over the next 20 years, identify a future land use map of where the community seeks to develop into the future, and set forth incentives and techniques for guiding growth into those areas, [76-1-601\(4\)\(c\), MCA](#). In addition, a growth policy may contain one or more neighborhood plans, which can provide more detailed long-term comprehensive planning for a more focused area within the jurisdiction, whose residents may have different or more cohesive goals, objectives, and strategies than elsewhere in the community. A community may have a growth policy in place and

then adopt a separately developed neighborhood plan as an amendment to the growth policy.

### 8.204 Procedure for Adoption and Amendment

The procedure for adopting a growth policy begins with the governing body requesting the planning board to prepare the document, [76-1-106, MCA](#). Typically, the planning board is assisted in this endeavor by city staff or a consultant to the city, [76-1-306, MCA](#). The board, however, is responsible for holding the public hearing or hearings on proposed growth policy, [76-1-602, MCA](#). After the public hearing, the planning board must make a recommendation to the governing body to adopt, revise, or reject the proposed policy, [76-1-603, MCA](#). After receiving the planning board recommendation, the governing body then makes the final decision to adopt, revise, or reject the proposed growth policy, [76-1-604\(1\), MCA](#). The governing body may also submit the question of whether or not to adopt the policy to electors within the growth policy's jurisdictional area, [76-1-604\(2\), MCA](#). The qualified electors of the jurisdiction area may also petition for a growth policy be adopted, revised, or repealed, [76-1-604\(4\), MCA](#).

## 8.3 ZONING

### 8.301 Types of Zoning

Zoning regulations direct the form and use of land and buildings. Zoning is one of the most common, effective, and flexible tools for implementing the land use goals and objectives identified in a city's or town's growth policy. Zoning began to emerge at the turn of the 20th century, when development was concentrated in cities and conflicts between residential and industrial uses began to appear in earnest. Boston and other cities began to enact restrictions on building heights, followed by Los Angeles and other cities dividing cities into separate districts for separate and incompatible uses. As these ordinances were challenged and upheld by the courts, more comprehensive zoning codes developed. (*Welch v. Swasey*, 214 U.S. 919 (1909); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).) In 1916, New York City adopted the first citywide zoning code in the nation.

In 1921, U.S. Department of Commerce Secretary and future President Herbert Hoover appointed an Advisory Committee on City Planning and Zoning, which included representatives from the U.S. Chamber of Commerce, the National Association of Real Estate Boards, the American Civic Association, the National Municipal League, the National Housing Association, and the National Conference on City Planning. Over the span of approximately 10 years, they created the first state enabling act statute. The first Standard State Zoning Enabling Act (SZA) was published by the U.S. Department of Commerce in 1924, and the revised edition in 1926. That same year, the U.S. Supreme Court upheld comprehensive zoning as a constitutional exercise of police power. (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).)

In 1929, Montana adopted the revised SZA edition essentially in whole. The Act specifically authorized municipalities to adopt zoning for the purpose of promoting the public health, safety, morals, and general welfare [76-2-301, MCA](#). Under the municipal zoning statute, cities and towns may divide their jurisdictions into districts where "it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land" [7-2-302\(1\), MCA](#). As to the specific regulations a municipality may wish to adopt, the statutory scheme is broad and flexible, allowing local governing bodies a great amount of deference in determining the best regulations based on local conditions. The statute specifically acknowledges that if a municipality's zoning regulations impose higher standards than required in any other statute or local ordinance, the municipality's zoning regulations govern [76-2-309, MCA](#). However, there are eleven specific criteria the

governing body must consider in each decision to adopt or amend a zoning ordinance<sup>1</sup> [76-2-304, MCA](#). Referred to as the Lowe criterion, the eleven criteria ask whether the new zoning:

1. Was designed in accordance with the growth policy;
2. Will secure safety from fire and other dangers;
3. Will promote public health, public safety, and the general welfare;
4. Will facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements;
5. Will provide adequate light and air;
6. Considers the effect on motorized and non-motorized transportation systems; Promotes compatible urban growth;
7. Gives reasonable consideration to the character of the district;
8. Gives consideration to the peculiar suitability of the property for particular uses;
9. Was adopted with a view to conserving the value of buildings; and
10. Will encourage the most appropriate use of land throughout such municipality.  
(*Lowe v. Missoula*, 165 Mont. 38, 41 (1974); *Lake County First v. Polson City Council*, 2009 MT 322 (2009).)

### **8.302 Consistency with Growth Policy**

In order to adopt a zoning ordinance, a municipality must first prepare and adopt a growth policy. As set forth in the original SZEA model, zoning regulations adopted by Montana municipalities must be made in accordance with the jurisdiction's growth policy [76-2-304, MCA](#). Further, in making zoning decisions, the governing body must "substantially comply with its growth policy." (*Heffernan v. Missoula City Council*, 2011 MT 91, P77-79.)

### **8.302 Procedure for Adoption and Amendment**

The statute also sets forth the procedure for adopting and amending zoning ordinances and regulations. The zoning commission must recommend the district boundaries and regulations to the governing body, [76-2-307, MCA](#). The zoning commission must prepare a preliminary report and "hold public hearings thereon" before submitting the report to the governing body. After receiving the report of the zoning commission, the governing body must hold a public hearing on the proposed regulations, with at least 15 days prior notice in a paper of general circulation, [76-2-303\(2\), MCA](#).

Amendments or changes to the zoning ordinance must follow the same public notice and hearing requirements for adoption, and the statute provides for a protest provision to any such changes, [76-2-305, MCA](#). The governing body may override such a protest by a two-thirds vote of the present and voting members. As set forth above, the governing body must again consider substantial compliance with the growth policy and each of the eleven Lowe criteria in any zoning amendments or rezoning decisions.

### **8.304 Variances**

The state statute acknowledges the need to permit occasional variances from zoning regulations and provides a specific process. Local governing bodies may make such decisions themselves, or more commonly, appoint a board of adjustment to "make special exceptions to the terms of the ordinance," [76-2-321\(1\)](#) and [76-2-323\(1\)\(b\) and \(c\), MCA](#). In accordance with the statute, the local governing body may delegate all, some, or none of this

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<sup>1</sup> There were original 12 criteria, but the statutory list was modified subsequent to the *Lowe* decision.

authority to the board of adjustment, [76-2-321\(2\), MCA](#). The statute specifically sets forth the grounds for authorizing “...such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done,” [76-2-323\(1\)\(c\), MCA](#).) The board can only grant a variance upon a concurring vote of four members, and any final decision of the board is immediately appealable to the district court, [76-2-327, MCA](#).

### 8.305 Conditional Use Permits and Nonconforming Uses

While the state statute is broad with respect to the specific form and use requirements that a local governing body can adopt to guide development within its jurisdiction, many of the procedures and requirements common to a zoning ordinance are found only at the local level. Such matters include, but are not limited to:

- Allowable uses in each zone and definitions for each, where the ordinance specifically identifies what types of uses are allowed;
- Development standards, setting specific requirements for the physical development of land uses in the community:
  - lot size (requiring a minimum or maximum size lot within the municipality, or within certain zones in the municipality, or for certain uses within certain zones)
  - building heights (restricting the height of buildings in certain zones or for certain uses),
  - setbacks (requiring minimum or maximum spacing between buildings on adjacent lots, or between a building on a lot and abutting alleys or streets)
  - parking (requiring a minimum or maximum number of spaces per unit or employees or specifying a required number of off-street spaces),
  - landscaping (requiring a minimum percentage of landscaped coverage of a lot, or providing a list of acceptable species, or requiring screening between a use and a neighboring use),
  - signs (e.g., limiting the number of signs allowed per property, or placing a maximum total square footage for signage on a lot, or restricting the illumination of signs in certain zones)
- Conditional use permits (also sometimes called “Special Reviews”), where a proposed use is allowed in a certain zone only through a quasi-judicial review and imposition of conditions to mitigate the effects on the use on surrounding properties, such as noise, traffic, or hours of operation; and
- Legal nonconforming uses, where a use lawfully existing as of the date of a change in the ordinance is allowed to continue under certain conditions. Municipalities employ a variety of options for allowing or restricting the expansion of nonconforming uses and structures or allowing development on nonconforming lots of record under certain conditions.

### 8.306 Interim Zoning

The Montana zoning statute also authorizes municipalities to adopt “interim” zoning to protect the public safety, health and welfare, [76-2-306, MCA](#); (State ex rel. Diehl Co. v. Helena, 181 Mont. 306 (1979)). Such zoning may be enacted as an urgency measure in order to prohibit or otherwise restrict uses that may be in conflict with a contemplated zoning proposal that the governing body is considering, studying, or intending to study within a reasonable time, [76-2-306\(1\), MCA](#). The governing body may adopt interim zoning without following the normal procedures required for adopting municipal zoning. After holding a properly noticed public hearing, the governing body may adopt interim zoning for a maximum period of 6 months, with the opportunity for two extensions of one year each, [76-2-306\(2\)](#) and [76-2-306\(3\), MCA](#).

## 8.4 SUBDIVISIONS

### 8.401 Local Authority and the Montana Subdivision and Platting Act

The Montana Subdivision and Platting Act (MSPA) was enacted in 1973 and requires the governing body of every city, county and town to adopt local subdivision regulations and provide for their administration and enforcement pursuant to statute (Title 76, Chapter 3).

### 8.402 Purpose of the Act

In its most basic form, the MSPA is intended to regulate the process by which new lots are created. The intent behind regulating the creation of new lots is to ensure orderly growth and development within a jurisdiction. This includes assessing the development of, and impacts to, public services and facilities such as roads and transportation, water, wastewater, stormwater, police, fire and emergency services, as well as education facilities, open space and other environmental constraints including hazard mitigation, impacts to wildlife and wildlife habitat, and impacts to the surrounding community. In evaluating these impacts resulting from development, the MSPA enables local governments to require mitigation for those impacts anticipated, to ensure the public health, safety and welfare needs of the public are met. The MSPA does not strictly govern the use of these new lots, unless the property being subdivided is also zoned.

### 8.403 Definition of Subdivision and Division of Land

A "division of land" means "the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter," [76-3-103\(4\) MCA](#). The definition goes on to state that "the conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land," meaning that a parcel previously created through subdivision or exemption does not require review prior to the transfer of title or ownership.

A "subdivision" is defined as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to the parcels may be sold or otherwise transferred and includes any re-subdivision and a condominium, [76-3-103\(15\) MCA](#). The term also means an area, regardless of its size, that provides or will provide multiple spaces for rent or lease on which recreational camping vehicles or mobile homes will be placed."

### 8.404 Restrictions on Land Transfers

The MSPA governs when and how land can be transferred in Montana, subject to the type of review tracts have had to undergo. For example, every final subdivision plat must be filed with the county clerk and recorder before title to the subdivided land can be sold or transferred in any way, [76-3-301\(1\), MCA](#). This prevents speculative sales prior to the physical creation of a lot. If a plat is attempted to be filed with the clerk and recorder without having met final plat requirements pursuant to [76-3-611\(1\)](#), statute allows the clerk to refuse to accept the plat for filing.

There are some minor exceptions to this rule. These restrictions to transfer of title are not applicable when the parcel or tract intended to be transferred is located in an area in which the state has no jurisdiction, such as federal lands. They are also not applicable to parcels that were created prior to the enactment of the MSPA on July 1, 1973, [76-3-302 et al, MCA](#).

Under certain circumstances, a subdivider may enter into contracts to sell lots following the approval or conditional approval of preliminary plat but prior to final plat pursuant to [76-3-303, MCA](#). In entering into such contracts, the purchasers of the future lots must make all payments to an escrow agent, which must be a bank or savings and loan association chartered to do business in Montana. Any payments made by the purchasers of the future lots may not be distributed by the escrow agent to the subdivider until the final plat has been reviewed and approved by the local governing body, and filed with the county clerk and recorder. Additionally, if final plat is not approved within two (2) years of establishing the contract, refunds will be made by the escrow agent to the purchaser. The county treasurer must also certify that there are no delinquent taxes on the property in question, and all contracts must contain language stipulating the temporary nature of the agreement and that *"until a final plat identifying the property has been filed with the county clerk and recorder, title to the property may not be transferred in any manner"* per [76-3-303\(5\), MCA](#).

#### **8.405 Local Subdivision Regulations**

The MSPA requires every municipality to adopt, administer and enforce local subdivision regulations for its respective jurisdiction. Relying on the MSPA generally or another jurisdiction's adopted regulations *does not* meet the intent or requirement of statute. In adopting local regulations, the governing body must first hold a public hearing to provide members of the public an opportunity to review and comment on the proposed regulations. Notice of the hearing must be published in a newspaper of general circulation, not less than 15 or more than 30 days prior to the hearing.

The MSPA sets forth a detailed list of what elements are required to be incorporated within local subdivision regulations; these requirements are set forth under [76-3-504\(1\), MCA](#) and generally pertain to application contents and format, review timelines, design standards to be met, environmental considerations, the administration of open space requirements, water use and agreements, growth policy compliance, agency coordination and pre-application process, and criteria and design guidelines pertinent to the review of land for rent or lease. In developing local subdivision regulations, the governing body of a jurisdiction is encouraged to establish standards and guidelines that reflect local growth and development desires of the community while also protecting public health, safety, and welfare.

Local regulations are not permitted to be more stringent than the state regulations or guidelines when addressing the same circumstances, [76-3-511\(1\), MCA](#). However, a governing body may adopt more stringent regulations if the governing body makes a written finding, after a public hearing and public comment has been taken, and based on evidence within the public record, that the proposed regulation or guideline is necessary to protect public health and safety, or can mitigate harm to the public health or environment and is achievable under current technology, [76-3-511\(2\), MCA](#).

#### **8.406 Subdivision Exemptions**

The MSPA provides that some divisions of land are exempt from the local review requirements of MSPA. In these cases, the circumstances resulting in the creation of a tract or parcel are not considered to have a significant impact that would trigger the need for comprehensive review of the division. In some instances, neither review

nor recordation of a survey is required for a parcel's creation; in other instances, a certificate of survey (COS) is still required to be filed. The following divisions are exempt from both the surveying and review requirements of the MSPA, although many times the owner or a lender voluntarily obtain a survey of the newly created lot or lots:

- Court-Ordered Divisions [76-3-201, MCA](#)
- Mortgage Security [76-3-201, MCA](#) (no tract of record is created unless and until foreclosure occurs)
- Severing Minerals [76-3-201, MCA](#)
- Cemetery Lots [76-3-201, MCA](#)
- Reservation of Life Estate [76-3-201, MCA](#)
- Agricultural Lease [76-3-201, MCA](#)
- No State Jurisdiction (such as federal, tribal lands) [76-3-201, MCA](#)
- Public Rights of Way and Utilities [76-3-201, MCA](#)
- Condominiums [76-3-203, MCA](#)
- Airport and State-owned Lands [76-3-205, MCA](#)
- Conveyances Prior to July 1, 1974 [76-3-206, MCA](#)
- Lands Acquired for state highways [76-3-209, MCA](#)

The following divisions are exempt from local review under the MSPA but must be surveyed:

- Relocation of Common Boundaries Outside a Platted Subdivision [76-3-207\(1\)\(a\), MCA](#)
- Gift or Sale to Immediate Family [76-3-207\(1\)\(b\), MCA](#)
- Divisions of Land Proposed for Agricultural Use Only [76-3-207\(1\)\(c\), MCA](#)
- Relocation of Common Boundaries Within Platted Subdivisions (up to five lots/lines) [76-3-207\(1\)\(d\), MCA](#)
- Relocation of Common Boundaries Within and Outside of Platted Subdivisions (amended plat/COS), [76-3-207\(1\)\(e\), MCA](#)
- Aggregation of Lots [76-3-207\(1\)\(f\), MCA](#)

### 8.407 Minor Subdivisions

Minor subdivisions, as defined by statute, are subdivisions that create five (5) or fewer lots from a tract of record [76-3-103\(9\), MCA](#). In order to qualify for review as a minor subdivision, the parent tract must not have six or more parcels created through subdivision or use of an exemption since July 1, 1973, including the currently proposed division.

**First minor subdivision.** If the tract of record proposed to be subdivided has not been previously subdivided and was not created by a subdivision under the MSPA, the subdivision is considered a 'first minor subdivision.' First minor subdivisions are reviewed subject to the local regulations adopted pursuant to [76-3-504 MCA](#) by the governing body; however, first minor subdivisions have a shorter review timeframe and are not required to prepare an environmental assessment. First minor subdivisions must still provide a summary of probable impacts based on the [76-3-608\(3\) MCA](#) review criteria found in statute, unless the proposed first minor subdivision is located in a jurisdictional area that has adopted zoning regulations that address the applicable -608 criteria.

The governing body may not hold a public hearing on a proposed first minor subdivision as part of the review process. The governing body may adopt requirements for the expedited review of a first minor subdivision, following the requirements set forth in statute under [76-3-609\(2\)\(f\), MCA](#).

**Subsequent minor subdivision.** When a minor subdivision is proposed on a parcel that has been previously subdivided or was created through a previous subdivision or exemption under the MSPA, it can no longer be considered a 'first minor' subdivision and is referred to as a subsequent minor. Subsequent minors

are reviewed as major subdivisions pursuant to statute, unless the local governing body has adopted regulations identifying specific requirements for review of subsequent minors, [76-3-609\(4\), MCA](#). These alternative requirements must meet or exceed the review requirements that apply to first minor subdivisions.

### **8.408 Major Subdivisions**

Major subdivisions are divisions of land proposing to create more than five lots at one time, or proposed divisions that will result in six or more lots being created from a single tract of record since July 1, 1973.

Major subdivisions are reviewed subject to the local regulations adopted pursuant to [76-3-504, MCA](#) by the governing body and following the requirements of the local review procedure set forth under [Title 76, Chapter 3, Part 6](#) of statute. Major subdivisions have longer review timeframes than minor subdivisions, require at least one public hearing, and involve the preparation of a complete environmental assessment. These processes and requirements are in place because, generally, major subdivisions are larger subdivisions and have a greater impact – whether cumulative or at one time -- than minor subdivisions.

### **8.409 Review Process and Timelines**

While the subdivision application process typically begins with a pre-application meeting, timelines specific to the review and approval of a proposed subdivision begin with the submittal of a completed application and supplemental materials. An application is considered formally submitted when the governing body and/or their designated reviewing agent receives the application materials and the associated fee; the governing body may establish a reasonable fee to be paid by the subdivider to cover the cost of reviewing a subdivision application, [76-3-602, MCA](#).

The first step in the review process following application submittal is typically referred to as ‘completeness’ or ‘element’ review, and is detailed under [76-3-604\(1\)\(b\), MCA](#). Within five (5) working days of receipt of a subdivision application, the reviewing agent determines whether or not the application contains all of the listed, required materials as required under [76-3-504\(1\)\(a\), MCA](#), and pursuant to the local regulations adopted. If the application contains all materials required, it is deemed complete; if materials are missing, the reviewing agent notifies the applicant in writing, identifying which elements are still needed in order to review the subdivision.

Following a determination of completeness, an application then moves into the second step, referred to as ‘sufficiency’ review, [76-3-604\(2\), MCA](#). The reviewing agent is allowed fifteen (15) working days from the date of the determination of completeness to make a subsequent determination that the application materials contain detailed, supporting information sufficient to allow for the review of the application in its entirety. If the reviewing agent determines the materials provided are sufficient, they will notify the applicant in writing. If additional information is required in order to make a determination of sufficiency, the reviewing agent will similarly notify the applicant of these additional requirements, identifying what information is necessary in order for the application to be deemed sufficient. A determination of sufficiency does not ensure that the proposed subdivision will be approved, or that additional information will not be requested by the governing body or reviewing agent during the review process pursuant to [76-3-604\(2\)\(c\), MCA](#).

Once an application has been determined to be sufficient, the official review timeline begins, [76-3-604\(4\), MCA](#). Review timelines differ between major and minor subdivisions. For a minor subdivision, the governing body must approve, conditionally approve or deny the subdivision within 35 working days. While a public hearing is not permitted for minor subdivisions, this 35 working day timeframe includes the reviewing agent’s evaluation of the proposed subdivision, preparation of the written report, findings and recommendation, as well as consideration

of and decision by the governing body.

For major subdivisions, the governing body is required to approve, conditionally approve or deny a proposed subdivision within 60 working days if the subdivision contains fewer than fifty (50) lots, and within 80 working days if the subdivision has fifty (50) or more lots. At least one public hearing is required within these timeframes, for public review and consideration of the major subdivision application. Pursuant to [76-3-504\(1\)\(r\), MCA](#), the governing body is required to notify the applicant in writing within thirty (30) working days following the decision to approve, conditionally approve or deny the subdivision application.

If the governing body fails to comply with the review timeframes provided under statute, the governing body will be responsible to pay the subdivider a financial penalty of \$50/lot per month, until the governing body makes a decision on the application, and not to exceed the total amount of the subdivision review fee collected. The subdivider and the governing body may, at any time, mutually agree to an extension or suspension of the review timeframes allotted, not to exceed one (1) year.

### **8.410 Public Review**

Major subdivisions and, if reviewed as a major subdivision or required by the governing body, subsequent minor subdivisions are required to have a public hearing as part of the subdivision review process. At minimum, one public hearing must be held by the governing body, their authorized agent or agency, or both, to consider all their designated agents, to serve in an advisory capacity and conduct the public hearing, and provide a recommendation on the proposed subdivision. Some governing bodies choose to hold the public hearing themselves; other jurisdictions have a public hearing by both the advisory planning board and by the governing body. Regardless who holds the hearing, notification must be given not less than fifteen (15) days prior to the scheduled hearing by publication in a newspaper of general circulation within the county. Additionally, each property owner of record whose property is immediately adjoining the land included in the preliminary plat must be notified of the hearing by certified mail, not less than fifteen (15) days prior to the hearing pursuant to [76-3-605, MCA](#).

### **8.411 Development Standards and Conditions of Approval**

The MSPA sets forth criteria for local government review in [76-3-608, MCA](#), stating *“the basis for the governing body’s decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter.”* In conducting its review and coming to a decision, the governing body prepares written findings of fact in support of their decision, based on the evidence provided by the applicant, applicable local, state or federal reviewing agencies, as well as written comments submitted by the public or oral testimony given in a public hearing on the application. These findings should address the primary review criteria set forth in statute, evaluating the subdivision’s impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety. The governing body will also evaluate and prepare findings that address the proposed subdivision’s compliance with the survey requirements set forth under MSPA; the local subdivision regulations, local review procedure, the provision of easements within and to the proposed subdivision for the location and installation of utilities; and the provision of legal and physical access to each parcel within the proposed subdivision.

When reviewing the proposed subdivision and evaluating potential impacts, the governing body may require the subdivision be designed in such a way that will reasonably minimize potential significant impacts identified through

the course of the review process. Any mitigation required must be justified through written findings of fact that document and support the relationship between the impact resulting from the development and the need for the type, and extent, of mitigation required. Mitigation required should be supported through enforceable conditions of approval, to ensure these requirements have been met prior to approving final plat.

The MSPA recognizes that there may be instances where the unmitigable impacts resulting from a proposed development are considered unacceptable, and the governing body may deny proposed subdivision. The governing body must notify the applicant in writing within thirty (30) days of the decision to approve, conditionally approve, or deny the proposed subdivision, [76-3-608\(1\), MCA](#). The statute sets forth an appeals process for parties aggrieved by a decision made by the governing body, [76-3-625, MCA](#).

### **8.412 Phased Subdivisions**

Public participation and the public's right to know are increasingly the subject of litigation in land use processes and decisions. In Montana, the public's right to know and to participate are fundamental rights provided by the Montana Constitution (Art. II Sec. 8 and 9). The *Legacy Ranch* decision out of Ravalli County in July 2015 focused on the public's constitutional right to know and participate, in regards to phased developments. In 2017, the legislature passed HB 445, which created a phased development process to address these issues, [76-3-504, MCA](#). The following process should be followed for any proposed subdivision that is expected at the outset to take more than three years to obtain final plat approval for all lots.

"Phased development" is defined as a subdivision application and preliminary plat that at the time of submission consists of independently platted development phases that are scheduled for review on a schedule proposed by the subdivider. The subdivider submits an overall phased development preliminary plat application on which independent platted development phases are presented. The application must contain the information required pursuant to parts 5 and 6 of MSPA for all phases and a schedule for when the subdivider plans to submit for review each phase of the development. The subdivider may change the schedule for review of each phase of the development upon approval of the governing body after a public hearing if the change does not negate conditions of approval or otherwise adversely affect public health, safety, and welfare.

The governing body reviews and approves, conditionally approves, or denies an overall phased development application under existing subdivision review process. Each phase or phases of the development must thereafter be submitted for review and approval, conditional approval, or denial within a timeframe set by the governing body, but in no case more than 20 years of the date the overall phased development preliminary plat is approved. The governing body may charge a reasonable fee for each phase review.

When the subdivider is ready to start a phase or phases, he or she must submit a written notice to governing body. The governing body must hold a public hearing with notice by publication and mailing within 30 working days after receipt of the written notice from the subdivider. After the hearing, the governing body shall determine whether any changed primary criteria impacts, or new information exists, since the time of approval of the overall phased development plat that create new potentially significant adverse impacts. The governing body must issue supplemental written findings of fact within 20 working days of the hearing and may impose necessary, additional conditions to minimize potentially significant adverse impacts identified in the review of each phase of the development for changed primary criteria impacts or new information. Any additional conditions must be met before final plat approval for each particular phase and the approval of each phase is in force for not more than 3 calendar years or less than 1 calendar year within the maximum time frame placed on the overall phased development plat.

### **8.413 Preliminary and Final Plat Approval**

After the governing body has made the decision to approve or conditionally approve a preliminary plat, the governing body must provide the subdivider with a written, dated and signed statement of approval. This statement should include the findings upon which the subdivision was approved, as well as all applicable conditions the subdivider must meet in order to receive final plat approval. Unless a subdivision improvements agreement is required to ensure the construction of all public improvements pursuant to [76-3-507, MCA](#), no additional conditions can be applied to a subdivision that has received preliminary plat approval (unless such approval expires). Preliminary plat approval is in force for no more than three (3) and no less than one (1) calendar year from the date upon which it received approval.

At the end of this three-year period, the governing body has the option to extend preliminary plat approval for a mutually agreed-upon timeframe; multiple extensions may be issued. Keep in mind that the extension of non-phased developments occurs without additional public review and comment and prohibits the governing body from imposing additional conditions on a previously approved preliminary plat. To address the public's right to know and participate in the subdivision extension process, the governing body should adopt standard criteria for the review and approval of requests for subdivision extensions as part of the local jurisdiction's subdivision regulations. If a subdivision proposal is expected at the outset to take more than 3 years to bring all lots to final plat approval, the municipality should review the subdivision application as a phased subdivision.

Once the subdivider has met the conditions of preliminary plat approval, they may apply for final plat approval to formally create lots. Final plat approval occurs only after the governing body reviews the request for final plat and determines all conditions have been adequately met, all real property taxes and special assessments have been paid, the examining land surveyor has reviewed the final plat for any errors or omissions prior to filing, all public improvements have been constructed or financially secured, and a subdivision improvements agreement entered into.

Upon receiving final plat approval, the subdivider can file the plat with the county clerk and recorder, and the lots are officially recognized as individual parcels for transfer. It is important the governing body recognize that final plat approval is the final step in the review process to create new lots; if a condition of approval has not been met prior to final plat, or is written in a manner that extends the life of the condition past the final plat approval, the governing body should recognize that it loses authority to enforce such conditions once final plat is approved. Ongoing maintenance or restrictions to use should be addressed through zoning other implementing regulations. The subdivision review process applies only to the creation of lots themselves; once a lot has been created, the process (and authority) is inherently complete.

## **8.5 BUILDINGS FOR LEASE OR RENT**

### **8.501 Local Regulations**

In 2013, the subdivision of land for lease or rent was removed from the Montana Subdivision and Platting Act, except for RV parks, campgrounds, and manufactured home parks. Sections [76-8-101, et seq.](#) allows for a more streamlined and easier process for landowners to rent or lease buildings on their property than full major subdivision review.

If a municipality is comprehensively zoned, buildings for lease or rent within that jurisdiction must simply comply with the local zoning requirements. In such a case, there is no additional overview or requirements to follow and the proposal is no longer subject to subdivision review. Otherwise the first 3 buildings for lease or rent on a single tract

require only sanitation review and approval. After that, buildings for lease or rent on a single tract must be reviewed and approved by the local governing body under local regulations adopted pursuant to the statute.

### **8.502 Exemptions from Buildings for Lease or Rent Review**

The statute exempts certain types of buildings for lease or rent from local review under the statute. Buildings that are subject to the lodging facility tax, buildings for farm or agricultural, and buildings that will not be leased or rented do not have to undergo review by the governing body, [76-8-103, MCA](#). In addition, landowners are allowed to continue renting or leasing the first three buildings that were in existence or under construction before the effective date of the statute (September 1, 2013) without local government review or approval.

### **8.503 Buildings for Lease or Rent Review Process and Timelines**

The local governing body has ten (10) working days to determine whether an application for a building for lease or rent is complete. If the application is deemed incomplete, the local governing body must provide written notification of the missing or insufficient information to the applicant. Once the application is deemed complete, the local governing body has sixty (60) working days to approve, conditionally approve, or deny the application. A building for rent or lease may be approved if it complies with the local regulations and other regulations applicable to the property; any potential significant impacts on the physical environment and human population in the area have been mitigated, the applicant has provided adequate access, emergency, medical, fire protection, police, water, sewer, and solid waste facilities, and the proposal complies with any applicable flood plain regulations.