January 31, 1997

Mayor Jim Wilson
125 N. Idaho St.
Dillon, MT. 59725

Dear Mayor Wilson,

In your letter of January 29, 1997 you pose a number of questions concerning the provisions of the City's new Charter and the transition to the new form of government under the Charter. I am pleased to respond as best I can to the questions you pose but I do so with two important disclaimers:

1. I am not an attorney nor does the Local Government Center provide legal opinion. We trust that our knowledge and understanding of a particular question or issue may, at best, serve as a useful starting point for competent legal council in providing your government with an authoritative interpretation of the Charter and of the relevant law; and

2. I cannot usefully comment on the "intent" of the Study Commission concerning the language of the Charter. The Study Commission itself is better positioned to do that than I. Even so, I would be extremely cautious in relying upon any expression of "intent" by the Study Commission as a basis for interpreting any Charter provision. It is important to remember that the language of the Charter was voted upon and approved by the electorate, irrespective of what any or all of the Study Commissioners may have intended. In short, the words in the Charter mean what they say, as interpreted by competent legal authority, which is to say by your city or county attorney, the Attorney General and the Courts.

For your convenience, my responses are organized in the same sequence as the questions you pose:

Sec.2.07

I see no specific provision whatever in the Charter for the appointment of an "acting mayor" in the absence of the mayor nor am I aware of any particular statute on the subject.

The language in the second sentence of 2.07 merely states that the president of the council shall serve as the presiding officer of the council in the absence of the mayor.

Because the powers and duties of the mayor set forth at Sec.3.08 of the Charter include the duty to preside at council meetings (3.08.9), one cannot reasonably infer that, in the absence

of the mayor, any other mayoral duty devolves upon the council president, nor should it in my opinion. The council itself has all the authority it needs under the Charter to appoint an "acting mayor" from among its own number or from the city staff (e.g. director of operations) who would presumably but not necessarily be endowed with whatever executive powers are included in Article 3, especially 3.08 and 3.09.

It seems to me that the council may choose to exercise the authority to make temporary appointments on an *ad hoc* basis but, if asked, it would be my opinion that the city council should develop and adopt a resolution defining a procedure whereby an "acting mayor" may be appointed by the council. I would suppose the procedure would first define an "absence" in a way that is distinct from a "vacancy" (Sec.3.05 and 7-4-4111, MCA); then enable the mayor and/or the president of the council to recommend or nominate an "acting mayor" for a specific and limited period of time to be approved by the council. Your existing ordinance or resolution on this subject may be a good starting point and may only require modest amendment. However, I would avoid designating the council president as the automatic acting mayor because any particular individual occupying that position simply may not be able or willing to assume the full time executive responsibilities of the City, even on a temporary basis.

As to your concern about the voting role of the president of the council when she or he is serving as its presiding officer, it is clear to me that the language of the second sentence of Sec.2.07 means that just because the president of the council happens to be serving as its temporary chair, he or she does not relinquish the power to vote and thus the ability to represent her or his district. Nor should he or she. After all, this person is not the executive officer of your government but merely a temporary presiding officer for the convenience of the legislative body who should have no more nor no less authority to vote than any other member of the council.

Given the charter provision for an eight member council and given the possible absence of the mayor and of an acting mayor so designated by the council, its is possible that a tie vote might occur (only 4 to 4 however because of Sec.2.14), in which case I believe the convention is that the motion under consideration will fail for want of a majority, and properly so. Let us agree that such a circumstance might prove inconvenient but do bear in mind that the inconvenience springs primarily and importantly from a lack of a majority opinion within your legislative body. The remedy to that circumstance is a motion to reconsider the issue when there is a majority position or when the mayor or an "acting mayor" may exercise the power of the mayor to break ties (Sec.3.10).

Sec.2.09 and Sec.2.10

A charter is required by law to include the grounds for removal from office of both council members and the mayor (7-3-704 and 705, MCA).

You will note that the language of Sections 2.09 and 3.06 meet this requirement by reference to state law which, in this case, includes the statute (7-4-411, MCA) enumerating the "events" that will cause a vacancy in office. Hence, the council need only come to a finding of fact that any one of the "events" enumerated in the statute has occurred in order to determine that a vacancy exists in the office of the mayor or of a council member. A review of the "events"

included in the statute suggests that the most likely causes for removal from office are specifically enumerated. With competent legal advice, the council may then proceed to fill the vacancy as provided by Sections 2.10 and 3.07 of the Charter. It seems to me that Study Commission was probably prudent in avoiding an attempt to improve upon state law on this delicate subject .

Your distress with the Charter provisions at Sec. 2.09 and 2.10 requiring council approval to fill a vacancy by five votes (a simple majority of the entire council) is not entirely clear to me. However, if you are simply asserting your belief that a number less than a simple majority of the whole number of council members *ought* to be sufficient to fill a council vacancy (for example, as few as 3 votes would be sufficient to constitute a majority of a five member quorum), I can only respond that the Charter provisions proposed by the Study Commission were, in fact, approved by your electorate.

I suppose that it is self-evident that five affirmative votes on any issue may, in some circumstances, be more difficult to achieve than four votes or three votes, for that matter. However, it does occur to me that the outcome of a vote by the majority of the council on such an important issue is more likely to reflect the disposition of the entire legislative body and therefore the interests of the entire community they were elected to represent. . In short, legislative efficiency was apparently not the only value that the Study Commission and the electorate considered in establishing this requirement. Should it prove unduly burdensome, the council may of course propose that the electorate consider an amendment to the Charter, pursuant to the provisions of 7-3-103(2), 7-3-104, and 7-3-155, MCA.

<u>Sec 2.14.</u>

I believe your interpretation of the language at Sec. 2.14 is correct. In essence, it seems to mean that at least half of your council must agree before a motion may be adopted. It occurs to me that if less than half of the council support the motion, then at the next council meeting when the entire council is present, a simple majority of four members could reverse a decision made by a minority of as few as three of your eight member council.

<u>Sec 3.06</u>

See my response at Sec. 2.09 and Sec. 2.10, above.

<u>Sec. 3.09.3</u>

I believe that, pursuant to Art. XI, Sec. 5(3) of the Montana Constitution and 7-3-701(2), MCA, the provisions of Sec. 3.09.3 of your Charter supersede the provisions of 7-3-113(1)(e), 7-3-213(3), and 7-4-4102, MCA. In short, I believe that all of the positions you identify in your comment as "officers" are either "department heads" or "employees" within the scope of Sec. 3.09, with the possible exception of the city attorney who may be under contract to the City (See 7-4-4602 and 4603, MCA) and the "Director of Operations" who, in my opinion, might best be thought of as an "administrative assistant" appointed by and solely accountable to the mayor (3.09.2). I also believe that the council may, if it so chooses, define all or some of your "officers" as "department heads" requiring the consent of the council prior to hiring or firing by the mayor. If the council chooses to do so, I would urge consultation with the city attorney and the adoption of a resolution setting forth the council's intent in this matter.

Sec.2.15.
I agree.

Sec. 5.03
It is my opinion that a minimum personnel management system should include: (1) a set of up to date personnel policies, approved by the council, dealing with such matters as hiring, termination, collective bargaining rights, employee safety, sexual harassment, compensation, leave and similar human resource management issues. (2) a position description for each employee; (3) a classification and compensation plan/policy that assures internal pay equity; (4) a formal grievance process; (5) and perhaps some provision for a personnel assistance program. In general, this seems to be what is contemplated by Sec. 5.03. The contents of the "administrative plan" required by Sec. 5.02 seem fairly clear.

Whether or not the City's present "administrative plan" and "personnel management system" meet the requirements of Sections 5.02 and 5.03 is entirely a matter for the council to decide. However, I do believe that the mayor is obliged by the Charter to present some sort of administrative plan and personnel system to the council for its consideration by July 1, 1998.

Sec. 7.04
As to your last paragraph referring to Sec. 7.04, I believe you may misunderstand the apparent requirement for the council to review the existing city ordinances to assure compliance and consistency with the Charter. There is a Charter requirement that the council shall review all existing city ordinances. Where any inconsistency or non-compliance may be found, the ordinance should simply be amended in the usual fashion provided by law (Part 42, Chapter 5, Title 7, MCA) to bring it into conformance and compliance with the Charter.

The ordinance you mentioned concerning the role of the council president is probably an example of an ordinance that does in fact need to be brought into conformance with your new Charter. If so, your usual ordinance amendment process will certainly suffice to accomplish that purpose.

There appears to be no requirement in the Charter for any ordinance to be approved by the voters, except, of course, as a result of the citizen initiative process.

I will be pleased to respond to any additional questions you or your transition team may have and we are always prepared to come to Dillon to assist with the transition process in any way we can.

Sincerely,

Dr. Kenneth L. Weaver
Director