

CHAPTER II

GOVERNING THE MUNICIPALITY

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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:

Board Name	Enabling Statute
Board of Adjustment	76-2-321, MCA
Cemetery District Board of Trustees	7-35-2131, MCA
Library Board of Trustees	22-1-308, MCA
Planning Board	76-1-221, MCA
Police Commission	7-32-4151, MCA
Zoning Commission	76-2-307, MCA

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.

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.*

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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](tel:7-1-4135), MCA). 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	●			
TOTALS	3	2	1	1

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				
TOTALS	5	0		1

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				
TOTALS	0	5		1