

CITY HALL
115 W. 1ST ST.
PUB. WORKS: 628-7496
WATER OFC.: 628-7431
COURT: 628-1964
FAX 628-2241

City Of Laurel

P.O. Box 10
Laurel, Montana 59044



Office of the City Attorney

MEMORANDUM

To: Mayor Mark Mace and City Council Members
From: Sam S. Painter
Date: November 27, 2017
Re: Legal Opinion: City Employee serving as elected Mayor

This memorandum and opinion is in response to the written complaints you received regarding the results of the recent mayoral election. As you are aware, Dave Waggoner was elected Mayor as a result of the November 7, 2017 election. Mr. Waggoner is to formally take office January 2, 2018. I note the complaints were filed by two current members of the city council who are residents of the City and voters in the election. The complaints question the ability of Mr. Waggoner, an employee of the City, to accept and serve as the mayor while he continues to work as an employee of the City. The short answer is no, based on Montana law Mr. Waggoner may not serve as mayor and remain a City employee. As a result, Mr. Waggoner must choose to remain an employee and decline to serve as Mayor or alternatively accept the Mayor position and resign his employment.

As you are aware, the City faced this identical issue in the previous mayoral election with the same employee. Mr. Waggoner ran for mayor in the previous election but was unsuccessful. Prior to the election, City Staff, including Mr. Waggoner's Supervisors, had discussions with Mr. Waggoner regarding the prohibition of an employee serving as elected mayor. Furthermore, I previously had discussions with Mr. Waggoner's union representatives regarding the requirement that if successful he would have to resign his position. During this election cycle, the same or similar discussions were had. Mr. Waggoner's response was identical to his previous position. Mr. Waggoner claims to have an attorney that provided him a contrary opinion. Based on that opinion, which no one has seen, Mr. Waggoner reportedly intended to legally challenge the City's position. At this point, this issue is ripe and must be resolved. For your convenience I am enclosing the documents I relied upon as a basis for my opinion. I suggest you provide this letter to the complainants and Mr. Waggoner and request his response. If Mr. Waggoner agrees to resign his employment prior to January 2, 2018, the issue is moot. On the other

hand, if Mr. Waggoner chooses to challenge the City's position and refuses to resign his employment and serve as mayor, an appropriate court action can be filed in advance to obtain a court order resolving the issue to avoid any disruption of the City's operations. Be advised, City Ordinance provides that a vacancy of an elected office can be determined by a competent tribunal. *Laurel Municipal Code, Section 2.12.060 K*. I would interpret "competent tribunal" to mean a court of competent jurisdiction such as Montana's 13th Judicial District Court, Yellowstone County which is a court of general jurisdiction that would certainly constitute the appropriate venue to issue an order to resolve this case.

As most are well aware, the City's legal position is based upon an opinion issued by Montana's Attorney General on October 13, 1998. *47 Op. Att'y Gen. No. 19 (1998)*. An Opinion issued by Montana's Attorney General constitutes the law for the State of Montana on the particular issue until overruled by a Montana Court or withdrawn or superseded by a subsequent Attorney General Opinion. In this case, the Attorney General's Opinion the City relies upon has not been overruled by a court and as a consequence, remains valid and enforceable Montana law. Therefore, based on the Attorney General's Opinion cited herein and the facts of this case, the conclusion is clear. Mr. Waggoner may not legally serve as the elected Mayor of Laurel without first resigning his City employment.

In regard to the Attorney General Opinion upon which the City relies, Attorney General Mazurek was asked to issue an opinion on three issues, two of which are relevant here. The relevant issues presented were whether a public works employee could be a city council member, and second whether a public works director, or any other appointed city officer, could hold the position of city council member. Attorney General Mazurek issued two opinions, only one of which applies to this case. Specifically, Attorney General Mazurek held that "a public works employee or director cannot be a city council member. The positions are incompatible." In formulating his opinion, Attorney General Mazurek focused on the common law rule against the holding of incompatible interests rather than analyzing whether a conflict of interest existed. Mazurek specifically cited a Montana Supreme Court Case that recognized two offices are incompatible when one has the power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper (for public policy reasons) for one person to retain both. *State ex. rel. Klick v. Wittmer, 50 Mont. 22 (1914)*.

As additional support, Attorney General Mazurek cited a previous opinion (*46 Op. Att'y Gen. No. 26*) in which he concluded that the common law doctrine of incompatible public offices applies to public employees, as well as to public office holders, finding that a county employee appointed by the board of county commissioners, and paid by the county cannot serve on the board of commissioners for the same county. *Id.* As final support for his opinion, Attorney General Mazurek quoted the Supreme Court of Wyoming who specifically found that "it is inimical (contrary) to the public interest for one in public employment to be both the employer

and the employee, or the supervisor and the supervised. *Thomas v. Dremmel*, 868 P.2d 263, 264 (Wyo. 1994). Importantly, Attorney General Mazurek noted that the determination of whether other appointed city offices and positions are incompatible with the office of city council member is fact-dependent and must be made on a case-by-case basis.

In this case, the sole issue is whether or not Mr. Waggoner's plant operator position is incompatible with the mayor position, pursuant to the analysis provided by the Attorney General Opinion cited herein. In my opinion, based on the City of Laurel's Charter, the position is clearly incompatible with the mayor position. As a side note, the Billings Gazette recently reported that Mr. Waggoner reportedly stated that "from what I gather about the structure of our government, I am still answerable to the council." Further, Waggoner reportedly stated "They are the final say. I don't see where it says that I can hire or fire myself." Clearly Mr. Waggoner has not reviewed the City's Charter, notwithstanding the fact he allegedly has an attorney's opinion on this matter, and has run for the mayor position in two consecutive elections. In my opinion, there is not a debatable issue here.

The City's Charter provides the basis for the conclusion the positions are incompatible in two specific places:

- Article III, Section 3.05 (Administrative Duties of the Mayor): (2) appoint with the consent of a majority of the council, all department heads and *may remove department heads without the consent of the council and may appoint and remove all other city employees* (emphasis added); and
- Article III, Section 3.10 (4): The chief administrative officer shall not have the authority *to terminate any city employee, that authority being reserved to the mayor* (emphasis added).

As provided above, under Montana law, two offices are incompatible when one has the power of removal over the other, when one is in any way subordinate to the other, when one has the power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper (for public policy reasons) for one person to retain both. *State ex. rel. Klick v. Wittmer*, 50 Mont. 22 (1914). In this case, the City's Charter provides the Mayor's authority to remove or terminate all city employees including the plant operator position. Secondly, the plant operator position is clearly subordinate to the mayor position as all city employees are subject to removal by the mayor. Third, the City's Charter provides the mayor with the sole and absolute authority to remove all city employees, including supervisors and department heads, without consent or approval of the council. In other words, the mayor's authority to supervise and terminate city employees is unilateral and requires no council consent or action. Finally, unlike other cities and towns, the Charter here vests complete administrative authority and responsibility in the mayor position. As a result, the plant operator's continued employment is contingent upon the mayor's

continued consent. Ultimately, if the plant operator serves also as the mayor, his/her employment continues until he terminates him/her self. As eloquently stated by the Wyoming Supreme Court, "it is inimical (contrary) to the public interest for one in public employment to be both the employer and the employee, or the supervisor and the supervised. *Thomas 868 P.2d at 264 (1994)*. Pursuant to the City's Charter, having the plant operator serving as the mayor is contrary to the public interest since he would clearly constitute the employer and employee in addition to the supervisor and supervised. Based on all of these facts and the analysis provided by Montana's Attorney General, the City's plant operator may not serve as the City's mayor. As a consequence, Mr. Waggoner needs to choose whether to serve as mayor or continue as a plant operator. Serving both positions is contrary to the City's Charter and Montana law.

The City also requested guidance how to proceed with this current situation. As I understand it, there has been discussion regarding the use of a special election. Please be advised, the City's Charter provides no mechanism for a special election. If Mr. Waggoner decides to serve as mayor and resigns his plant operator position, the issue is moot. He will take office in January. However, if Mr. Waggoner decides to not accept the mayor position the City must follow *Article V, Section 5.03* of its Charter. The section provides when a vacancy occurs in any elected office, the position shall be considered open and subject to nomination and election at the next general municipal election in the same manner as the election of any person holding the same office. However, the term shall be limited to the unexpired term of the person who created the vacancy. Until the next general municipal election, the council must appoint a qualified person to serve as the mayor. A qualified person is any person who resides (continuously) within the city limits. In the past, the City has filled vacant elected positions through an application process that included a letter of interest and presentation by the applicant during a regular council meeting. The council then appointed an applicant by a majority vote. I suggest the council utilize a similar process, if Mr. Waggoner decides not to accept the mayor position and the position becomes vacant.

The final issue I am anticipating is the term of an appointed mayor. If the mayor position is vacant and filled by appointment, I am sure the issue of his/her term will be raised. Please be advised I reviewed the relevant portions of the City's Charter, Ordinances and Montana law. Based on my review it is my opinion the appointed mayor would serve until the City's next general municipal (city) election. *City Charter, Article V, Section 5.03, Laurel Municipal Code Section 2.12.070*, and *Montana Code Annotated §7-4-4112*. Furthermore, City Ordinance requires all elections to be conducted as nonpartisan elections under Title 13, Chapter 14 of the Montana Code Annotated. A general municipal (city) election is defined by Montana law within Title 13. Specifically, Montana Code Annotated provides: §13-1-101 (19) "General election" means an election that is held for offices that first appear on a primary election ballot, unless the primary is canceled as authorized by law, and that is held on a date specified in §13-1-104. Section §13-1-104 provides (1) A general election must be held throughout the state on the first Tuesday after the first

Monday in November. Importantly, §13-1-104(3) provides in *every odd-numbered year, the following elections must be held on the same day as the general election (a) an election of officers for municipalities required by law to hold the election.*

Therefore, based on Montana law, the recent 2017 election constituted a “general election” as defined by §13-1-104 (3). Further, the next general municipal election would then be in November, 2019. As a consequence, an appointed mayor would fill the vacancy until the next general municipal election in 2019. In November 2019, the City would elect a mayor who would finish “the mayor’s unexpired term.” In other words, the appointed mayor would serve until he/she faces election in the general municipal election in November, 2019. Finally, the mayor elected as a result of the November, 2019 general municipal election would only serve the two year “unexpired term” until November, 2021, when he/she would then have to run for the full four-year mayoral term.

Respectfully submitted,



Sam S. Painter,
Civil City Attorney