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VOLUME NO. 46

OPINION NO. 4

CITIES AND TOWNS - Procedure for and effect of closure or vacation of streets by mayor-council form of government;
MUNICIPAL GOVERNMENT - Commission-manager form, mayor-council form: procedure for and effect of closure or vacation of city streets;
TRAFFIC - Procedure for and effect of closure or vacation of city streets by mayor-council form of municipal government;
MONTANA CODE ANNOTATED - Sections 7-3-4301, -4448, 7-14-4101, -4114;

OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 24 (1985).

HELD: Mont. Code Ann. § 7-14-4114 gives a municipality the authority either to close all or part of a street to through traffic without giving up its legal interest in the street, or to vacate all or part of the street and revoke its legal interest in it. A municipality with a mayor-council form of government is not bound by Mont. Code Ann. § 7-3-4448 and must follow the procedures set forth in Mont. Code Ann. § 7-14-4114 when it seeks to discontinue, close, or vacate a street. The procedure for either type of action is the same and is prescribed in the statute; choosing between the two alternatives is a matter for the discretion of the city or town council.

May 3, 1995

Mr. John T. Flynn
Broadwater County Attorney
P.O. Box 96
Townsend, MT 59644-0096

Dear Mr. Flynn:

You have requested my opinion on a question I have phrased as follows:

When a city that has a traditional mayor-council form of government wishes to vacate a street, what procedure is required, and what is the legal effect of the vacation on the city's interest in the property?

As you correctly point out, the case of Wynia v. City of Great Falls, 183 Mont. 458, 600 P.2d 802 (1979), is the source of many questions in this area. In that case, a basic distinction was made between: (1) a city's action in "closing" a street to through traffic, but not revoking its interest in the street; and (2) a city's action in "vacating" a street and revoking its legal interest in the street. Wynia, 183 Mont. at 469-70, 600 P.2d at 809. This distinction is an important element of your question. Unfortunately, the terms "closure," "abandonment," "discontinuance" and "vacation" as applied to trafficways are not used consistently in Mont. Code Ann. § 7-14-4114 or among the several states. In an attempt to bring clarity to this area, the following distinction in terminology will be used in this opinion: To "close" a street will mean that a municipality has closed a street to through traffic without revoking its legal interest in the street; to "vacate" a street will mean that a municipality has foregone the use of a street and has revoked its legal interest in the street. However, as the following analysis shows, the legislature has not always used these terms in this technical sense. The lack of consistency in the usage of the terms alluded to above is, if anything, more pronounced in the cases of "abandoned" and "discontinued" trafficways. I see no need to further complicate the discussion by offering my opinion on those terms.

The distinction between "vacation" and "closure" was necessary in the Wynia case because of two overlapping statutes regarding the closure, vacation, and discontinuance of city streets. Mont. Code Ann. § 7-14-4114 deals with general municipal powers related to closure of trafficways and sets forth procedures for cities and towns to "discontinue," "close," or "vacate" streets. As Wynia demonstrates, its provisions apply to both mayor-council and commission-manager municipalities, despite its references only to the "council." Mont. Code Ann. § 7-3-4448, on the other hand, deals with a particular form of municipal government, the commission-manager form (which in Wynia was the defendant City of Great Falls' form of government), and specifies the procedures that must be used when such a city or town "vacates" a street. Based on the facts, the consistent use of "vacate" throughout Mont. Code Ann. § 7-3-4448, and the fact that "vacate" was described in the statute to include relinquishment of ownership, the Court concluded that the City had merely (but plainly) intended to "close" the street to through traffic, and that Mont. Code Ann. § 7-14-4114 controlled.

Because your questions concern the mayor-council form of government and its powers and required procedures when either closing or vacating streets, I must initially make several points. First, Mont. Code Ann. § 7-3-4448 applies only to commission-manager forms of government. Mont. Code Ann. § 7-3-4301. The Wynia case gives no indication to the contrary. Second, under procedures set forth in Mont. Code Ann. § 7-14-4114, cities and towns have authority to

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both close and vacate public streets. Wynia, 183 Mont. at 468-69. Smart v. City of Big Timber, 165 Mont. 328, 335, 528 P.2d 688, 692 (1974); 40 Op. Att'y Gen. No. 24, 92 (1983).

In Smart, the Court observed that the legislature did not use great precision in drafting the various amendments to the statutes which ultimately became Mont. Code Ann. § 7-14-4114. The court stated:

[T]he present statute is the amalgam of the intent of a number of legislatures. This is important when this single statute purports to deal with the "discontinuance", "closing", and "vacation" of streets. It appears that the terms were thought of by the draftsmen as interchangeable.

165 Mont. at 335. With this observation in mind, this statute should not be read as though the legislature used the quoted terms in their technical senses, as words of limitation. Thus, the reference in subsection (1) of Mont. Code Ann. § 7-14-4114 to the power to "discontinue" a street should be read to include both "closure" and "vacation," as those distinct terms were used by the Court in Wynia. Similarly, the procedure for "closing" a street or alley for school purposes in subsection (2) of the statute should be followed whether the council wishes to "vacate" the street or alley or to "close" it. Similarly, the Wynia decision stands for the proposition that the notice provisions of subsection (3) of Mont. Code Ann. § 7-14-4114 apply when a street is "closed," even though the notice provisions by their terms refer only to a petition asking that a street be "vacated."

The upshot of all this is that a commission-manager municipality seeking to "vacate" a street apparently must follow Mont. Code Ann. § 7-3-4448, but may choose to rely on Mont. Code Ann. § 7-14-4114 for any action short of "vacation." Any other form of municipal government which seeks to either "vacate" or "close" a street must follow Mont. Code Ann. § 7-14-4114.

You ask what specific procedure a city or town with a mayor-council form of government must follow in order to vacate a street. No Montana statute specifies a procedure beyond that set forth in Mont. Code Ann. § 7-14-4114 to close or vacate a street. That statute says nothing to differentiate the procedure for "closing" a street from that used to "vacate" a street. In an analogous situation, the Montana Supreme Court has said:

Where a power is conferred upon a municipality and the mode [of exercise] is prescribed, such mode must be followed; but if no mode is prescribed, the power is to be exercised in such manner as municipal officials, in their discretion, shall determine upon.

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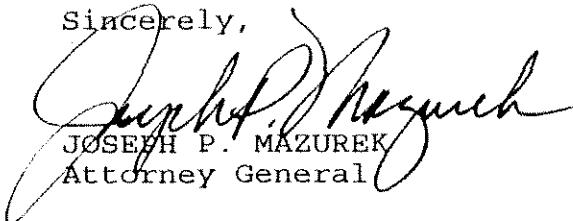
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State v. Stark, 100 Mont. 365, 370, 52 P.2d 890, 892 (1935) (citations omitted); quoted in Leischner v. City of Billings, 135 Mont. 109, 113, 337 P.2d 359, 361 (1959). Thus, I conclude that when the municipal officials of a "traditional" mayor-council government vacate a street, they must follow the mode of exercise of the power specified in Mont. Code Ann. § 7-14-4114, but the choice between vacating a street and closing a street lies within their discretion.

THEREFORE, IT IS MY OPINION:

Mont. Code Ann. § 7-14-4114 gives a municipality the authority either to close all or part of a street to through traffic without giving up its legal interest in the street, or to vacate all or part of the street and revoke its legal interest in it. A municipality with a mayor-council form of government is not bound by Mont. Code Ann. § 7-3-4448 and must follow the procedures set forth in Mont. Code Ann. § 7-14-4114 when it seeks to discontinue, close, or vacate a street. The procedure for either type of action is the same and is prescribed in the statute; choosing between the two alternatives is a matter for the discretion of the city or town council.

Sincerely,



JOSEPH P. MAZUREK
Attorney General

jpm/rfs/brf