

VOLUME NO. 41

OPINION NO. 37

CITIES AND TOWNS - Elections conducted on partisan or
nonpartisan basis;

LOCAL GOVERNMENT STUDY COMMISSIONS - Effect of election conducted on alternative form of government;
MONTANA CODE ANNOTATED - Sections 2-16-501, 7-3-113, 7-3-121 to 7-3-161, 7-3-141(2), 7-3-171 to 7-3-193, 7-3-185(2), 7-3-201 to 7-3-224, 7-3-219(1);
MONTANA CONSTITUTION - Article XI, sections 3(1), 9(1);
REVISED CODES OF MONTANA, 1947 - Sections 16-5115.1, 47A-3-203, 47A-3-203(h) (i).

- HELD: 1. Malta's local elections must be conducted on a partisan basis in the future, unless the voters adopt a different plan of government.
2. Those local public officers who were elected on a nonpartisan basis after May 2, 1977, served as de facto officers and their official acts should be regarded as legal. Local officeholders who were elected on November 5, 1985, may exercise their duties in the same manner.

2 December 1985

Willis M. McKeon
Phillips County Attorney
Phillips County Courthouse
Malta MT 59538

Dear Mr. McKeon:

You have requested an opinion on several questions which are related to the basic issue of whether local elections in the City of Malta should be conducted on a partisan or a nonpartisan basis.

Your inquiry arises from research carried out by the existing Malta Local Government Study Commission. The Commission has submitted a series of questions to the Phillips County Clerk and Recorder, who serves as the local election administrator. In order to understand the exact nature of these questions, some background is in order.

Until the mid-1970s, local governments developed through many years of growth and statutory change. There was no single local government code as such. Existing statutes were confusing, contradictory, scattered, and repetitive. As a result, pressing local problems were

unresolved or postponed. Schuman v. Study Commission of Yellowstone County, 176 Mont. 313, 317, 578 P.2d 291, 294 (1978). In 1972, the new state constitution required that the Legislature provide for the adoption of statutory forms of government and for a local government review process. Sections 3(1) and 9(1) of Article XI of the 1972 Montana Constitution state:

Section 3. Forms of Government. (1) The legislature shall provide methods for governing local government units and procedures for incorporating, classifying, merging, consolidating, and dissolving such units, and altering their boundaries. The legislature shall provide such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon an optional or alternative form by a majority of those voting on the question.

....

Section 9. Voter review of local government. (1) The legislature shall, within four years of the ratification of this constitution, provide procedures requiring each local government unit or combination of units to review its structure and submit one alternative form of government to the qualified electors at the next general or special election. [Emphasis added.]

In 1975, the Legislature implemented the above-quoted sections of the new constitution by enacting various local government statutes which defined existing governmental forms and provided for several alternative forms. Of particular interest for the City of Malta, which had a mayor-council form of government, was the enactment of section 16-5115.1(1), R.C.M. 1947 (currently codified as section 7-3-113, MCA). Section 16-5115.1(1), R.C.M. 1947, provided that if a local government, organized under the general statutes authorizing the mayor-council form of government, did not adopt a new form of government, then it was governed by certain statutes after May 2, 1977, including one requiring partisan elections. § 47A-3-203(h)(i), R.C.M. 1947, currently codified as § 7-3-219(1), MCA. The Legislature's power to define those forms of government

that existed where alternative forms were not adopted was upheld in Schuman, supra, 578 P.2d at 295.

As mandated by Article XI, section 9(1) of the 1972 Montana Constitution, and implemented by the local government legislation passed in 1975, a Malta Local Government Study Commission was formed in 1974. Its duties included reviewing the form of government that was already in place and submitting to the voters at the next election a choice between the existing form and an alternative. The Study Commission sought advice from local organizations and government officials, held public hearings, and surveyed citizen attitudes over a two-year period. It is clear from the Commission's final report that it had determined that the form of government best suited to the people of Malta was a mayor-council form of government, with elections conducted on a nonpartisan basis. Nonpartisan elections had been conducted in the past in Malta; however, the newly-enacted section 16-5115.1(1), R.C.M. 1947, required that those cities which kept the mayor-council form of government, without adopting one of the new alternative forms of government, must conduct partisan rather than nonpartisan elections. Of the several alternative forms of government provided by the Legislature, which are currently set forth in Title 7, chapter 3, parts 2 to 7, MCA, one of them authorized a mayor-council structure with nonpartisan elections as one of its features. §§ 7-3-201 to 224, MCA. This was the alternative form of government which the Malta Study Commission recommended to the voters in 1976.

Before the November election of 1976, the Malta Local Government Study Commission published its final report in the local newspaper, as it was required by law to do. Copies of the report were made available to the public three months before the election. The report explained that in order for Malta to continue conducting its local elections on a nonpartisan basis, voters must approve the recommended alternative to the existing form of government. While both options included the mayor-council form of government, the type of elections, i.e., partisan versus nonpartisan, was the distinguishing feature. The following excerpts are from the 1976 final report of the Malta Local Government Study Commission.

In this final report we obey the mandate of the 1972 constitution and the state legislature in presenting one alternative form of government. Because the overwhelming majority of those interviewed, those who attended our meetings, and those who responded to our surveys favored retaining the present form of government with no changes except changes which can be made within the structure of the present form, we submit an alternative form which contains no drastic change but still provides for a simplification which constitutes enough of a change to qualify as an alternative form according to the 1972 constitution and state law.

....

SUMMARY OF RECOMMENDATIONS

The Malta Local Government Study Commission thoroughly studied Malta's present form of city government, and examined the alternative forms of government available under state law. We present the following as the most satisfactory alternative form of city government.

1. The City of Malta shall adopt, effective May 2, 1977, the Mayor-Council form of government, with general government powers. It will differ from the existing form only in that its elections shall be non-partisan.

2. The question for the adoption of this alternative form or the retention of the present form shall be submitted to the voters of the City of Malta on November 2, 1976, in the following form:

OFFICIAL BALLOT

BALLOT ON ALTERNATIVE FORM OF LOCAL
GOVERNMENT FOR THE CITY OF MALTA

VOTE FOR ONE

☐ For adoption of the Council-Mayor form of government, with general government powers, with elections conducted on a non-partisan basis, as proposed in the report of the Local Government Study Commission.

☐ For the existing form of City Government.

....

The Study Commission's hearings and interviews with the public have shown that they do not want any substantial change in the form of city government. In their study of the present form, the Study Commission noted that the present form does not rule out partisan elections. If one or more candidates for city office filed on a party ticket, the city would have to conduct a primary election, followed by a general election. The Study Commission feels that city councils of small cities should not be controlled by party politics or divided along party lines. Therefore, they propose as the alternative form that City of Malta elections shall be non-partisan. This is the only difference between the present form and the alternative form. Both are Mayor-Council forms with general Government powers. [Emphasis added.]

The final report went on to provide sample certificates, one for the establishment of the "existing" plan of government and one for establishment of the "proposed" form. In the sample certificate for the "existing" plan, the Study Commission referred to section 47A-3-203(h)(i), R.C.M. 1947, which is quoted as requiring partisan elections. By contrast, the sample

certificate for the "proposed" plan cites the requirement for nonpartisan elections.

The above-quoted portions of the final report are not the only efforts made by the 1976 study commission to explain the difference between the existing form of government and the proposed alternative. Two charts that were attached to the final report contain further pertinent information for the voter. One chart contains columns showing the characteristics of the two different forms of government. For the category called "Elections," the column for "Present Form" of government reads "partisan"; the column for the "Proposed Form" of government reads "non-partisan." In the "Comment" column the following statement appears:

This is the only change in the proposed form. Under the present form, if a candidate filed on a party basis, city would have to hold a primary election.

The second chart is an organizational chart showing that the city electorate elects the city council, with a notation that under the "present form" there would be partisan elections and under the "proposed form" there would be nonpartisan elections.

With that explanation offered to the voters by the Malta Local Government Study Commission, the proposed alternative form of government was voted on in November 1976. The final vote in the 1976 election was:

--305 votes cast for the alternative (Council-mayor form of government ... with elections conducted on a non-partisan basis, as proposed in the report of the Local Government Study Commission);

--650 votes cast for the existing form of government.

Following the 1976 election, the chairman of the Study Commission filed with the proper authorities a "Certificate Establishing Ratified Plan of Government for Malta, Montana," indicating that the ratified government would be organized under section 47A-3-203, R.C.M. 1947, including subsection 3(h)(i), which required partisan elections. However, the City of Malta

continued to conduct its local elections on a nonpartisan basis, and apparently the practice was not seriously questioned until the currently-existing Local Government Study Commission began its research.

This rather lengthy recitation of the results of the 1976 local government review in Malta is meant to explain the origins of the following questions which you have posed:

1. Are the local elections of the City of Malta to be conducted on a partisan or a nonpartisan basis?
2. If the elections are and were to be conducted on a partisan basis from and after May 2, 1977, how is the validity of the elections conducted on a nonpartisan basis prior to 1985 affected?
3. If the elections prior to 1985 are invalid, what effect does this have on the status of the currently elected city officials who have not completed their terms in office and what effect does this have on the validity of the laws and regulations which the elected city officials have enacted during their terms?
4. Currently, a nonpartisan election for city government is set for November 5, 1985. If the Malta elections are to be conducted on a partisan basis, which steps would be taken to assure the validity of this 1985 election?

Although it is easy to understand how an uninformed voter could be misled into believing that a vote for the "existing" form of government was a vote for not only the old form of government, but also all of its features, the voters were advised otherwise. The final report of the Malta Local Government Study Commission informed voters of the implications of their votes. It explained that in order to continue with nonpartisan elections the alternative, which was recommended by the Commission, should be adopted.

This is not a case where electors were deprived of a right to vote or where there was any debasement or dilution of their votes. See Burger v. Judge, 364 F. Supp. 504, 511 (D. Mont. 1973). There is no suggestion that the final report of the Malta Local Government Study Commission was intended to misrepresent any facts or mislead the voters. To the contrary, the final report of the Study Commission clearly advised the voters of the difference between a vote for the "existing" form of government and a vote for the Commission's proposed alternative. In Kohler v. Tugwell, 292 F. Supp. 978 (E.D. La. 1969), plaintiffs complained that the ballot's description of a proposed constitutional amendment misled voters because it was inartfully worded. The court agreed that the ballot language was confusing, but upheld the election.

It is apparent that the text is so turgid that it would be difficult to say that any ballot designation could describe it accurately. ... They [voters] must come to the polls prepared in advance to vote on the amendments if they are to vote with any semblance of understanding. ... The procedure followed by Louisiana does not deprive the plaintiffs of Due Process for it is sufficient that Louisiana's voters were informed by the ballot of the subject of the amendment, were given a fair opportunity by publication to consider its full text, and were not deceived by the ballot's words.

292 F. Supp. at 980-81.

I conclude that because the Malta voters in 1976 were advised by publication of the implication of their votes on a form of government, the results of the election are binding. Thus, when the voters adopted the "existing" form of government, partisan elections became a feature of Malta's mayor-council form of government, as of May 2, 1977, by operation of section 16-5115.1(1), R.C.M. 1947.

Should the voters of Malta desire that local elections legitimately be conducted on a nonpartisan basis, they may still opt for the plan of government provided for in sections 7-3-201 to 224, MCA. That form of government allows voters to adopt a mayor-council structure with

either partisan or nonpartisan elections. See § 7-3-219, MCA. The procedures for recommending such a change are set forth in sections 7-3-121 to 161, MCA (petition for alteration), and sections 7-3-171 to 193, MCA (recommendation of study commission). The specific authority to propose a new plan of government by petition is found in section 7-3-141(2), MCA. A study commission's authority is found in section 7-3-185(2), MCA.

Your second and third questions deal with the validity of those local elections held in Malta since May 2, 1977, which have been conducted on a nonpartisan basis, and the legality of actions taken by local officers who were elected during that time. Where there has been an irregularity in the conduct of an election due to an honest misapprehension of the law, courts have generally agreed that the elected officers are "de facto" officers, who may perform duties under color of right. 63A Am. Jur. 2d Public Officers and Employees §§ 578-79; 28 Am. Jur. 2d Elections § 226. The circumstances surrounding Malta's local elections do not suggest bad faith on the part of election officials. Therefore, it is my opinion that those officers who were elected to local office after May 2, 1977, served as de facto public officials and their official acts should be regarded as legal. The affairs of society cannot be carried on in any other way. See State ex rel. Flynn v. Ellis, 110 Mont. 43, 50, 98 P.2d 879, 882-83 (1940); State ex rel. Buckner v. Mayor of Butte, 41 Mont. 377, 386-87, 109 P.2d 710, 712-13 (1910); 3 McQuillin Municipal Corporations §§ 12.106-07 (3d ed. 1982).

Your last question concerns the recently-held election of November 5, 1985, which was conducted on a nonpartisan basis. As has already been discussed, those officials who were elected at this past election may exercise their duties as de facto officers. The statutory procedure for filling vacancies does not apply, since no vacancies can be said to exist under section 2-16-501, MCA. See Conboy v. State, 42 St. Rptr. 120, 124, 693 P.2d 547, 550 (1985). Thus, unless vacancies should occur, as defined in section 2-16-501, MCA, there is no need to address this matter, and the incumbent de facto officeholders may serve throughout the remainder of their terms. However, the next local election in Malta should be conducted on a partisan

basis unless an alternative has been adopted by the voters.

THEREFORE, IT IS MY OPINION:

1. Malta's local elections must be conducted on a partisan basis in the future, unless the voters adopt a different plan of government.
2. Those local public officers who were elected on a nonpartisan basis after May 2, 1977, served as de facto officers and their official acts should be regarded as legal. Local officeholders who were elected on November 5, 1985, may exercise their duties in the same manner.

Very truly yours,

MIKE GREELY
Attorney General