

VOLUME NO. 35**Opinion No. 90**

COUNTY OFFICERS—Local government study commission, eligibility for; OFFICES AND OFFICERS—Local government study commission, eligibility for; PUBLIC OFFICERS AND EMPLOYEES—Local government study commission, eligibility for; PUBLIC OFFICERS AND EMPLOYEES—Local government study commission, incompatibility of offices. Montana Constitution, Article V, section 7 (1889); Montana Constitution, Article V, section 9, and Article VI, sections 1 and 5 (1972); sections 11-3407, 16-5103 and 16-5107, R.C.M. 1947.

- HELD:**
- 1. A seat on a local government study commission is a public office.**
 - 2. Members of the legislative assembly and the elected officials of the executive branch of state government as defined in Article VI, section 1, Constitution of Montana, 1972, may not hold the position of local government study commissioner.**
 - 3. County or municipal officers, not specifically precluded by law from holding other public office, are prohibited from holding the office of local government study commissioner if that position is incompatible under common law principle with their county or municipal office.**

July 12, 1974

Mr. Thomas A. Olson
 Gallatin County Attorney
 County Courthouse
 Bozeman, Montana 59715

Dear Mr. Olson:

You have requested my opinion as to whether public officials, including but not restricted to elected officials, may be candidates for local government study commissions while maintaining their present offices.

The organization and functions of local government study commissions are set forth in Title 16, chapter 51, Revised Codes of Montana, 1947. According to section 16-5103, R.C.M. 1947, every board of county commissioners and the council of every municipality must have passed a resolution establishing a study commission prior to April 15, 1974. All study commissioners are to be elected at the general election on November 5, 1974, and their terms expire June 30, 1977. Since your letter did not specify particular public officers, I will focus my discussion on members of the legislature, officers of the executive branch of state government, and county and municipal officeholders.

I.

LEGISLATIVE AND EXECUTIVE OFFICERS

Article V, section 9, Constitution of Montana, 1972, provides in part:

No member of the legislature shall, during the term for which he shall have been elected, be appointed to any civil office under the state; ... (Emphasis supplied)

In the case of **Barney v. Hawkins**, 79 Mont. 506, 257 P. 411 (1927), the Montana Supreme Court discussed the meaning of the term "civil office." The court set forth the following criteria:

After an exhaustive examination of the authorities, we hold that five elements are indispensable to any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional. 79 Mont. at 528, 529.

The court further concluded that the phrase "civil office" is synonymous with the term "public office."

It is readily apparent that a member of a study commission meets the criteria outlined in numbers (1) through (4) above. In regard to the fifth characteristic of permanency and continuity, there is no requirement that a public position must be perpetual in order to be considered a public office. **Forty-second Legislative Assembly v. Lennon**, 156 Mont. 416, 481 P.2d 330 (1971). Indeed, the Montana Supreme Court has held that an office is permanent and continuous until the functions for which it was created are completed. 156 Mont. at 425. Furthermore, in **Lennon** the court held that members of the state legislature could not hold more than one public office during the term for which they were

elected. The court based its conclusion on Article V, section 7, Constitution of Montana, 1889, which is nearly identical to Article V, section 9, Constitution of Montana, 1972. Therefore, I conclude that a seat on a local government study commission is a public office, and thus prohibited to members of the legislature during their term by Article V, section 9, *supra*.

In regard to officers of the executive branch of state government, Article VI, section 5, Constitution of Montana, 1972, provides in pertinent part:

(2) **During his term, no elected officer of the executive branch may hold another public office** or receive compensation for services from any other governmental agency. (Emphasis supplied)

The officers of the executive branch as defined in Article VI, section 1, Constitution of Montana, 1972, are the governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and the state auditor. Thus, the above-mentioned officers are precluded by Article VI, section 5, *supra*, from membership on a local government study commission.

II.

COUNTY AND MUNICIPAL OFFICERS

Insofar as your question applies to county or municipal officers, I am unable to find any constitutional or statutory provisions specifically prohibiting such officers from simultaneously holding another public office with the exception of section 11-3407, R.C.M. 1947. Section 11-3407, *supra*, precludes commissioners under a consolidated city-county form of government from holding other public office except in the state militia or as a notary public. It should also be noted that section 16-5107 (11), R.C.M. 1947, precludes county commissioners and municipal councils from appointing any elected official of the local government unit in the event a vacancy occurs, or an insufficient number of study commissioners are elected in the 1974 general election.

In the absence of specific constitutional or statutory prohibitions, the answer to your question depends on the compatibility of the study commission office with any other particular county or municipal office. It is a settled principle of common law that two or more incompatible public offices may not be held by one person at the same time. **Knuckles v. Board of Education**, 272 Ky. 431, 114 S.W.2d 511 (1938). Furthermore, my predecessors in office have held numerous kinds of offices to be incompatible within the meaning of the common law. For example: County commissioner and school trustee (8 **Opinions of the Attorney General**, p. 402 (1920)); county attorney and city attorney (10 **Opinions of the Attorney General**, p. 330 (1923)); county treasurer and clerk of school district (15 **Opinions of the Attorney General**, no. 403 (1933)); and city alderman and city health officer (9 **Opinions of the Attorney General**, p. 213 (1922)).

In the case of **State ex rel. Klick v. Wittmer**, 50 Mont. 22, 144 P. 648 (1914), the Montana Supreme Court held that the office of city alderman and the position of city purchasing agent were incompatible and could not be held

simultaneously by one person. The factors set forth by the court which must be considered in determining the incompatibility of public offices are as follows:

Offices are "incompatible" when one has power of removal over the other ..., when one is in any way subordinate to the other ..., when one has power of supervision over the other ..., or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both ... 50 Mont. at 24-25.

In order to determine whether two offices are incompatible it is necessary to compare the functions of each office with that of a local government study commissioner in view of the above-mentioned factors. This must be done on a case by case basis, and it is impossible to generalize and hold all county or municipal offices either compatible or incompatible with the office of local government study commissioner.

THEREFORE, IT IS MY OPINION, based upon the above considerations:

1. A seat on a local government study commission is a public office.
2. Members of the legislative assembly and the elected officials of the executive branch of state government as defined in Article VI, section 1, Constitution of Montana, 1972, may not hold the position of local government study commissioner.
3. County or municipal officers, not specifically precluded by law from holding other public office, are prohibited from holding the office of local government study commissioner if that position is incompatible under common law principles with their county or municipal office.

Very truly yours,
ROBERT L. WOODAHL
Attorney General