

November 2017

Local Government Interim Committee
Leanne Kurtz

EVOLUTION OF SECTION 7-33-4101, MCA

Introduction

Section 7-33-4101, MCA, is central to the Local Government Interim Committee's HJR 25 study of municipal fire statutes. The section reads:

7-33-4101. Fire department authorized and required. In every city and town of this state there must be a fire department, which must be organized, managed, and controlled as provided in this part except that a third-class city or town may contract for fire protection services or consolidate its fire department with another fire protection provider created under this part.

The effect of the statute is that cities whose populations render them first- and second-class are required to provide fire protection through paid fire departments. As provided in 7-33-4109, cities of the second class may supplement their paid departments with volunteers, but cities of the first class may not. Cities of the third class and towns are not required to have a paid department (although they are not prohibited from doing so) and may contract for fire protection or be part of a rural fire district. Growth or reduction in population will impact the type of fire protection service communities are required to maintain. Understanding how these provisions evolved over time may be useful as the Local Government Committee considers the issues articulated in HJR 25.

Permissive then Required

The 6th Legislative Assembly enacted what would eventually become 7-33-4101 in 1899. The section was last amended in 1997. The 1899 language gave authority to an entity called the Council of Cities and Towns to establish fire departments:

The Council of Cities and Towns shall have power to establish a Fire Department and prescribe and regulate its duties, to maintain a fire-alarm telegraph, to erect engine, hose and hook-and-ladder hoses, and provide engines and other implements and apparatus for the extinguishing of fire.

In *State ex rel. Kern v. Arnold* (1935), it was held that under this section and others governing municipal fire departments that “a city was empowered but not compelled to maintain a fire department. The city operated its fire department as a proprietary function, except when engaged in extinguishing or going to or from the scene of a fire or testing equipment for such occasions, when it was exercising governmental functions.”¹

In 1937, the 25th Legislature amended the section, which would read, in part: “There shall be in every city and town of this State a fire department, which shall be organized,

¹ 2016 Annotations to the MCA, Section 7-33-4101.

November 2017

Evolution of 7-33-4101

Local Government Interim Committee

Leanne Kurtz

managed and controlled as in this act provided.” The Council of Cities and Towns remained in charge of the fire departments.

A 1947 amendment gave the Council of Cities and Towns authority to contract with a fire district to extend fire protection within 3 miles outside of the limits of a city or town. “Pursuant to any such contract so made,” Section 11-5109, R.C.M. 1947, would read, “the council may authorize the fire department of such city or town to combat and extinguish fires beyond the limits of the city or town, under such rules and regulations as may be prescribed by the council.”

Section 11-1936, R.C.M. 1947, allowed for cities of the second class to provide for a volunteer fire department to supplement the paid department. Uncertainty over what this language meant for cities of the first class prompted State Fire Marshall William Penttila to request an Attorney General’s Opinion on two questions, the first² of which was “May a first-class city which has a paid fire department supplement that department with volunteer firemen?” Montana Attorney General Robert Woodahl issued an opinion³ in 1974 clarifying that cities of the first class may not supplement their paid fire departments with volunteers. Attorney General Woodahl cited section 11-1936, R.C.M. 1947, which stated in part: “In addition to a paid department, the city council, city commission or other governing body in cities of the second class may make provision for a volunteer fire department in addition to the paid fire department ...” Woodahl then quoted from *Helena Valley Irrigation District v. State Highway Commission*, 150 Mont. 192: “It is a rule of statutory construction that the express mention of one matter excludes other similar matters not mentioned,” concluding that “[t]he express mention of second-class cities in section 11-1936, supra, excludes all other classes of cities not mentioned, including first-class cities. Thus, a first-class city which has a paid fire department may not supplement that department with volunteer firemen.”

HB 211, 1997

Choteau Representative Sam Rose sponsored HB 211, which passed the 1997 Legislature nearly unanimously. The bill consisted of a single section.

Section 1. Section 7-33-4101, MCA, is amended to read:

"7-33-4101. Fire department authorized and required. In every city and town of this state there ~~shall~~ must be a fire department, which ~~shall~~ must be organized, managed, and controlled as provided in this part except that a third-class city or town may contract for fire protection services or consolidate its fire department with another fire protection provider created under this part."

In his opening testimony in the Senate Local Government Committee, Rep. Rose said municipal and rural fire departments often worked together and shared many of the same firefighters. According to the hearing minutes, Rep. Rose said the following:

[M]unicipal departments are still required to be separate from rural departments and this is where the problem has developed. In Choteau many of the volunteers belong to both departments. The conflict is who pays the Workmen's

² Penttila’s second question involved provision of pensions for volunteers.

³ 35 A.G. Op. 67 (1974)

November 2017

Evolution of 7-33-4101

Local Government Interim Committee

Leanne Kurtz

Compensation. Because the law is not clear, they must provide Workmens Comp. for both the city and the county. These double premiums increase the cost of fire protection to the people in the district. This will give cities the option to contract and cooperate with rural fire districts. This will create better and more efficient fire districts in our rural communities and it is entirely optional. Fire protection will still be required by cities and towns but the law will allow the service to be provided to contract or consolidated fire departments. This will also provide services at a more reasonable rate.

In the minutes the following comments are attributed to Alec Hansen, then-Executive Director of the Montana League of Cities and Towns:

If this bill was passed, a third class city or town, which is anything under 5000 inhabitants, could contract with a rural fire department to provide services within the town or they could consolidate. For years the county has been able to contract with other counties for police protection and this has saved a lot of money. It will make the fire departments more efficient, save the tax-payers money and create less jurisdictional confusion.

Additional proponents included representatives of the Montana Municipal Insurance Authority and the Montana State Firemen's Association. There were no opponents.

Section 7-33-4101 has not been amended since 1997.

Rural Fire Districts and Third-Class Cities and Towns

Rural fire districts are provided for in Title 7, chapter 33, part 21. Section 7-33-2101 specifically allows incorporated third-class cities and towns to be included in a rural fire district:

7-33-2101. Rural fire districts authorized — petition. (1) The board of county commissioners is authorized to establish fire districts in any unincorporated territory or, subject to subsection (2), incorporated third-class city or town upon presentation of a petition in writing signed by the owners of 40% or more of the real property in the proposed district and owners of property representing 40% or more of the taxable value of property in the proposed district.

(2) (a) Third-class cities and towns may be included in the district upon approval by the city or town governing body.

(b) A third-class city or town may withdraw from a district 2 years after providing to the board of county commissioners notice of intent to withdraw.

Prior to the 2007 session, the section allowed establishment of a rural fire district in “any unincorporated territory or town.”

A subcommittee of the Environmental Quality Council undertook a wide-ranging study of fire-related statutes during the 2005-2006 interim. Among the subcommittee's conclusions was that cities and towns should be able to be included in a rural fire district, upon approval of the city or town governing body. The bill draft approved by the subcommittee did not limit the

November 2017

Evolution of 7-33-4101

Local Government Interim Committee

Leanne Kurtz

provision to third-class cities and towns, but as the bill progressed through the 2007 Legislature, that distinction was included.

Section 7-33-2101 has not been amended since 2007.