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Legal Opinion 2016-003

TO: Denise Alexander, Development Services; Benjamin Brewer, Development Services; Mike Haynes, Development Services; Mary McCrae, Development Services; Laval Mean, Development Services; Tom Zavitz, Development Services; Jen Gress, Development Services; Drew Larson, Development Services; John Engen, Mayor; City Council; Dale Bickell, CAO

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE February 8, 2016

RE: Montana Municipal Zoning Laws Require Appeals of Municipal Zoning Board of Adjustment Decisions to be Made to a Court of Record Within 30 Days of the Filing of the Decision

FACTS:

Many years ago when the City of Missoula (City) was annexing certain lands along Reserve Street in response to citizen expressions of concern, the City indicated that it would adopt the Missoula County zoning classification applicable to certain lands as a City municipal zoning classification. However, Montana municipal zoning laws are substantively different from Montana County zoning laws in some respects. It has recently been noted that pursuant to the Missoula County zoning classification that the City adopted appeals of a zoning board of adjustment decision has the appeal being made to the local government governing body, rather than to a court of record, as Montana municipal zoning law requires. Therefore, the City needs to amend this zoning classification to ensure its compliance with Montana municipal zoning laws.

Development Services staff requested a formal legal opinion that could be utilized and relied on for amending the current zoning classification that poses the legal problem.

ISSUE:

Pursuant to Montana municipal zoning laws, where are appeals of a municipal zoning board of adjustment submitted to?

CONCLUSION:

Pursuant to Mont. Code Ann. § 76-2-327 of Montana's municipal zoning laws, an appeal of a decision of a Montana municipal zoning board of adjustment is to be made to a court of record.

LEGAL DISCUSSION:

Mont. Code Ann. § 7-1-114 identifies mandatory provisions of Montana state law that local governments are subject to despite possessing self-government powers. Mont. Code Ann. § 7-1-114, entitled *Mandatory provisions*, provides:

7-1-114. Mandatory provisions. (1) A local government with self-government powers is subject to the following provisions:

...

(e) all laws that require or regulate planning or zoning;... (emphasis added)

Montana's municipal zoning laws are set forth in Title 76, Chapter 2, Part 3 entitled *Municipal Zoning*. Mont. Code Ann. § 76-2-327, *Appeals from board to court of record*, provides:

76-2-327. Appeals from board to court of record. (1) Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment or any taxpayer or any officer, department, board, or bureau of the municipality may present to a court of record a petition, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be presented to the court within 30 days after the filing of the decision in the office of the board.

(2) Upon the presentation of the petition, the court may allow a writ of certiorari directed to the board of adjustment to review the decision of the board of adjustment and shall prescribe in the writ the time within which a return must be made and served upon the relator's attorney, which may not be less than 10 days and may be extended by the court. The allowance of the writ does not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board, and on due cause shown, grant a restraining order. The board of adjustment may not be required to return the original papers acted upon by it, but it is sufficient to return certified or sworn copies of the original papers or of portions of the original papers that may be called for by the writ. The return must concisely set forth other facts that may be pertinent and material to show the grounds of the decision appealed from and must be verified.

(3) If, upon the hearing, it appears to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence that it may direct and report the evidence to the court with the referee's findings of fact and conclusions of law, which constitute a part of the proceedings upon which the determination of the court must be made.

(4) The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. (Emphasis added.)

Pursuant to 38 Op. Att’y Gen. No. 98 (1980) the Montana Attorney General held that Mont. Code Ann. § 7-1-114 prohibits a local municipal legislative body from providing for an optional appeal of municipal zoning board of adjustment decisions since Mont. Code Ann. § 76-2-327 provides that an appeal may only be made to a court of record.

CONCLUSION:

Pursuant to Mont. Code Ann. § 76-2-327 of Montana’s municipal zoning laws, an appeal of a decision of a Montana municipal zoning board of adjustment is to be made to a court of record.

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/s/

Jim Nugent, City Attorney