

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2016-014

TO: City Council, Mayor John Engen, Dale Bickell, Mike Haynes, Leslie Schwab, Laval Means, Marty Rehbein, Kirsten Hands, Ginny Merriam

CC: Department Attorney

FROM: Jim Nugent

DATE: June 8, 2016

RE: Evidence may include testimony, documents and tangible objects that tend to prove or disprove the existence of an alleged fact and is the means from which an inference may logically be drawn as to the existence of a fact.

FACTS:

Applications for permits for land uses or authorizations on private property affect private property rights of the private owner and are often considered to be quasi-judicial proceedings of the public body that must make a decision pertaining to the approval, conditional approval or denial of a permit application. The quasi-judicial nature of applications for permits for private property land uses; because it directly affects private property rights also necessitates that the members of the public body making the final decision or determination with respect to the permit application be neutral, impartial, unbiased, fair and objective in their process and procedure as well as with respect to their conduct, actions and communications prior to the public review and public hearing that occurs.

A recent denial of a private property owner application for a demolition permit by the City Historic Preservation Commission for a private building has been appealed to the City Council. Both the current private property land use and a proposed future private property land use are authorized by the current city zoning that is applicable to the private property. One of the challenges that the City council will be faced with as part of the City Council review is to attempt to distinguish actual evidentiary facts from speculation, conjecture, assertions, opinions, emotional outbursts, advocacy and allegations from any actual evidence that establishes facts relevant to the City Council's review and decision making.

ISSUE(S):

What is "evidence" compared to potential speculation, conjecture, assertions, opinions, emotional outbursts, advocacy and allegations?

CONCLUSION(S):

Evidence is something that tends to prove or disprove the existence of an alleged fact.

LEGAL DISCUSSION:

More than four (4) decades ago, the Montana Supreme Court ruled against the City Council of the City of Missoula downzoning property, noting that under the guise of protecting the public, the city could not unduly interfere with private business by imposing unjust limitations upon the full use and enjoyment of property that deprives the property owner of property rights or devalues the property. The Montana Supreme Court also said that land use decisions must be based on actual evidence and not based on emotional outbursts.

In 1974 the Montana Supreme Court in *Lowe v. City of Missoula*, 525 P. 2d 551 (1974) invalidated a Missoula City Council's downzoning of lands on the east side of Waterworks Hill as an abuse of discretion by the Missoula City Council, supra at 555. The Montana Supreme Court in *Lowe* stated:

This Court not only has authority to review the record made before the City Council plus the new testimony, but also has the responsibility to provide supervision in accord with established principles of practice. Where the information upon which the City Council and the district court acted is so lacking in fact and foundation, as heretofore noted, it is clearly a mistake of fact and constitutes an abuse of discretion. It is within the power of this Court to correct this mistake of fact by judicial review of the entire record.

This Court in *Freeman v. Board of Adjustment*, 97 Mont. 342, 355, 34 P.2d 534, 538, restricted zoning where it imposed unjust limitations on property and deprived the owner of his property rights. The Court held:

"Under the guise of protecting the public or advancing its interest, the state may not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights." *City of Jackson v. Bridges*, 243 Miss. 646, 139 So.2d 660; *Garner v. City of Carmis*, 28 Ill.2d 560, 192 N.E.2d 816.

....
Considering the volatility of problems that arise under zoning ordinances and laws regulating the use of land, we note with approval the language of the federal district court of the District of Columbia, in *American University v. Prentiss*, 113 F.Supp. 389, 393, affd. 94 U.S.App.D.C. 204, 214 F.2d 282, 348 U.S. 898, 99 L.Ed. 705, 75 S.Ct. 217, wherein the court held:

" * * * Although possible impairment of property values seemed to be the main argument, very little actual evidence on the subject was produced. The testimony consisted chiefly of emotional outbursts on the part of individual homeowners, to the general effect that they had been informed by real estate experts that if the hospital were erected, the value of their property would

decrease anywhere from thirty-five to fifty percent. Naturally such assertions are not evidence. * * *

"It is well established that administrative agencies are not required to apply the rules of law governing admissibility of evidence. These rules are binding only on judicial tribunals. Nevertheless, the probative weight of evidence is the same, irrespective of where the evidence is introduced, and must be tested by the same standards whether it is tendered to a court or to an administrative body."

In view of the mistake of facts submitted to the City Council and upon which the district court based its decision, we find such was an abuse of discretion necessitating reversal.

Judgment is reversed and the City Council is directed to set aside Ordinance No. 1549. (*Emphasis added.*)

The Montana Supreme Court in *Lowe* criticized the Missoula City council decision in part stating that "very little actual evidence on the subject was produced".

Montana state law title 26 MCA is entitled "EVIDENCE". Chapter 1 of title 26 is entitled "STATUTORY PROVISIONS ON EVIDENCE". Subsection 26-1-101(2) MCA of the general definitions defines the term "evidence" as meaning:

"26-1-101. GENERAL DEFINITIONS. . . . (2)
'Evidence' is the means of ascertaining in a judicial proceeding the truth respecting a question of fact, including but not limited to witness testimony, writings, physical objects, or other things presented to the senses."

Black's Law Dictionary Eighth Edition at page 595 sets forth the following general definitions of the term "evidence" that might be helpful to the City Council in conducting its appeal review.

"Evidence. Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact."

"Evidence broadly defined is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. Evidence is the demonstration of fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other."

The phrase "probative evidence" is defined at page 598 as meaning:

“Probative evidence. Evidence that tends to prove or disprove.”

The phrase “relevant evidence” is defined at page 599 as meaning:

“Relevant evidence. Evidence tending to prove or disprove a matter in issue. Relevant evidence is both probative and material and is admissible unless excluded by a specific statute or rule.”

Public body decisions with respect to specific applications for land uses directly affecting private property owner private property rights are often referred to as quasi-judicial decisions. As such, pursuant to the Montana Rules of Evidence in some limited circumstances, a judicial body may take judicial notice of facts. Pursuant to Montana Rule of Evidence 201(b), the kinds of facts for which judicial notice may be taken are “A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned” (*Emphasis added*)

CONCLUSION(S):

Evidence is something that tends to prove or disprove the existence of an alleged fact.

OFFICE OF THE CITY ATTORNEY



Jim Nugent, City Attorney

JN:ajg