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Legal Opinion 2016-016

TO: City Council, Mayor Engen, Dale Bickell, Mike Haynes, Leslie Schwab, Laval Means, Marty Rehbein, Kirsten Hands, Kelly Elam, Ellen Buchanan, Chris Behan

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE June 22, 2016

RE: Title 20 Zoning Missoula Municipal Code Appeals of Administrative Decisions to City Council Review as Review for error rather than de novo review

FACTS:

The applicant for a demolition permit for the Merc building was denied a demolition permit by the City of Missoula Historic Preservation Commission. The applicant has appealed the denial of the permit to the City Council. The city council review of the appeal is being processed pursuant to section 20.85.100 Missoula Municipal Code (MMC), entitled "APPEALS OF ADMINISTRATIVE DECISIONS". Pursuant to section 20.85.100 MMC, the city council review will be a review to determine if there was error committed by the Historic Preservation Commission. A request has been made to our office to identify the differences between a de novo appeal review and a review for error by the Historic Preservation Commission.

ISSUE(S):

What are primary differences between a de novo appeal review and an appeal review for determination of error by the Historic Preservation Commission?

CONCLUSION(S):

A de novo appeals hearing would be a new hearing as if the hearing appealed from had not taken place. A de novo hearing gives no deference to the findings and conclusion of the public body whose decision has been appealed. An appeal review for error involves a review of the record upon which the action appealed is taken for determination as to whether there was error made with respect to the earlier decision that is now the subject of the appeal.

LEGAL DISCUSSION:

Black's Law Dictionary, Eighth Edition at page 738 defines "hearing de novo" as meaning 1. A reviewing court's decision of a matter anew, giving no deference to a lower court's findings. 2. A new hearing of a matter conducted as if the original hearing had not taken place." Applying this general legal definition of a "hearing de novo", a de novo city council appeal hearing would mean a new hearing on the demolition permit application as if the Historic Preservation Commission hearing and decision had not taken place, with no deference to the Historic Preservation Commission decision.

Alternatively, pursuant to section 20.85.100 MMC, entitled "APPEALS OF ADMINISTRATIVE DECISIONS", a city council appeal review of the Historic Preservation Commission decision for error includes the following review provisions:

- (1) City Council is authorized to hear and decide appeals "where it is alleged there has been an error in any order, requirement, decision or determination made by the" Historic Preservation Commission "in the administration, interpretation or enforcement of this zoning ordinance", referring to Title 20 ZONING. See subsection 20.85.100(A) MMC;
- (2) The City Council "is authorized to make determinations about whether individuals filing appeals are 'aggrieved by the decision or action'." See subsection 20.85.100(B) MMC;
- (3) The record of the Historic Preservation Commission that is being appealed, "must" be transmitted to the City Council, including "all papers constituting the record upon which the action appealed is taken". See subsection 20.85.100(E) MMC.;
- (4) A City Council public hearing on the appeal must be publicly noticed. See subsection 20.85.100(F) MMC;
- (5) A city council public hearing must be held. See subsection 20.85.100(G)(1) MMC;
- (6) The City Council must take action on the appeal with the City Council decision required to be supported by written findings of fact. See subsection 20.85.100(G)(2) MMC;
- (7) "In exercising the appeal power, the City Council has all the powers of the official from whom the appeal is taken, and the City Council may reverse the appeal or affirm the appeal, in whole or in part, or modify the decision being appealed." Note the phrase "city council" is substituted for "Board of adjustment" within the quote from the City of Missoula ordinance. See subsection 20.85.100.(G)(3) MMC;
- (8) "In acting on the appeal the City Council must grant the official's decision a presumption of correctness, placing the burden of persuasion of error on the appellant." Note "city Council" is substituted for "Board of Adjustment" in the above ordinance quotation. See subsection 20.85.100(G)(4) MMC;

(9) "An appeal may be sustained only if the City Council finds that the zoning officer or other administrative official erred." Note "City Council is substituted for Board of Adjustment" in the quotation of the City of Missoula ordinance. See subsection 20.86.100(H) MMC;

(10) "The City Council may grant a rehearing on any appeal of administrative decision if the rehearing request includes new evidence to be presented that was not available at the time of the original hearing OR WHEN THE CITY COUNCIL DETERMINES THAT GOOD CAUSE HAS BEEN SHOWN FOR A REHEARING. The request for a rehearing must be made within 30 days after the City Council's decision and must follow all procedures of this section 20.85.100, including payment of any required filing fees." Note City Council is substituted for Board of Adjustment" in the quote of the City of Missoula ordinance. See subsection 20.85.100(I) MMC;

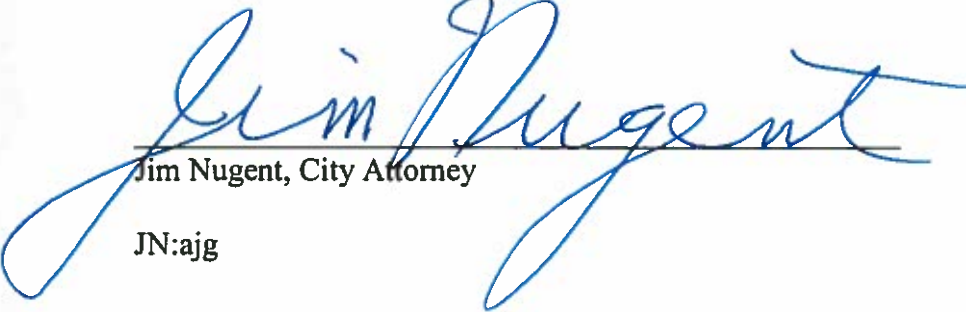
(11) Any person aggrieved by the City Council decision may appeal the City Council decision to district court within 30 days. See subsection 20.85.100(J) MMC.

Clearly the City Council has a breadth of authority and power to exercise in reviewing the appeal submitted to the City Council for review.

CONCLUSION(S):

A de novo appeals hearing would be a new hearing as if the hearing appealed from had not taken place. A de novo hearing gives no deference to the findings and conclusion of the public body whose decision has been appealed. An appeal review for error involves a review of the record upon which the action appealed is taken for determination as to whether there was error made with respect to the earlier decision that is now the subject of the appeal.

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