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Legal Opinion 2017-005

TO: City Council; Mayor John Engen; Dale Bickell; Ellen Buchanan; Chris Behan; Leigh Griffing; Steve Johnson; Donna Gaukler; Rod Austin; Tiffany Brander; Department City Clerk

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 7, 2017

RE: Unlawful for city council legislative body to condition hotel and conference center construction project approval to be based on a mandate in city developer agreement provision that developer must enter into labor peace agreement with union in order to be able to implement hotel and conference center construction project

FACTS:

Hotel Fox Partners, LLC has been working with the City of Missoula in recent years to put together a hotel and conference center urban renewal project west of Orange Street on the north side of the Clark Fork River adjacent to both Orange Street and Clark Fork River. The site is also commonly referred to as the former Fox Theater site, although the land area is larger than the former Fox Theater site. In recent months a union, UNITE HERE, that desires to represent future employees after construction of any future hotel or restaurant(s) at the site have been lobbying for city elected officials to require that in order for Hotel Fox Partners, LLC to be able to implement an approved hotel, conference center and parking structure project, Hotel Fox Partners, LLC., must first enter into a UNITE HERE, union proffered labor peace agreement with respect to future hotel and restaurant(s) employees before they could commence construction. The current union requested process and proposed agreement basically empowers the union with the ability to (through not reaching an agreement with Hotel Fox Partners, LLC.) create an impasse and thereby prevent the construction project from proceeding. If Hotel Fox Partners, LLC does not reach agreement with the union's labor peace agreement provisions and demands. Such an impasse potential unfairly, unequally and unreasonably empowers the union not only with respect to any negotiations; but also empowers the union to indirectly become in control of the final approval authority for the project.

ISSUE(S):

Is it lawful for a legislative body to, in essence, allocate, assign, bestow, deliver or entrust legislative authority and power to control approval of a construction project to a third party pursuant to a provision in a city development agreement that mandates that the developer must enter into a labor peace agreement with a union, without providing any standards, guidelines, or criteria by which the reasonableness of the third party's action and conduct can be evaluated and measured and without providing the developer with an appellate opportunity for an independent review of the third party's actions, inactions or conduct?.

CONCLUSION(S):

If the city council, as legislative body, allocates, assigns, bestows, delivers or entrusts its legislative authority and power to a third party to control or in essence approve whether a construction project is allowed to proceed to a third party, such as the UNITE HERE union, by mandating that the developer enter into a labor peace agreement with the union, without providing for any review or evaluation standards, guidelines or criteria of the reasonableness of union actions, inactions or conduct and does not provide for an independent appellate opportunity for the developer before construction may commence; the attempted legislative body delegation of legislative body authority constitutes an unreasonable unlawful delegation to a third party of the legislative body's power and authority to control or approve the construction project.

LEGAL DISCUSSION:

The construction of the hotel and conference center has not yet commenced. It is anticipated that many union workers will be involved in the construction of the hotel and conference center. Hotel and restaurant(s) operators or affiliations are yet to be known or determined. Also, currently unknown is whether hotel and restaurant(s) employees will desire to be unionized and if so, what union they will desire to be represented by. It appears that the proposed parking at a proposed parking structure will be administered by the City parking commission, whose employees are generally unionized; but not represented by UNITE HERE.

UNITE HERE union requests that Missoula City Council mandate in its project development agreement with Hotel Fox Partners, LLC, that Hotel Fox Partners, LLC. enter into a labor peace agreement with UNITE HERE in order for Hotel Fox Partners, LLC to be able to implement the hotel and conference center project. Such a mandate constitutes an unlawful delegation of the City council's legislative authority to approve the construction project to a third party, the union; because if Hotel Fox Partners, LLC does not agree to the union's demands there is an impasse and Hotel Fox Partners, LLC is not allowed to proceed to implement the proposed construction project. The union proposed agreement does not include any standards, guidelines or criteria for evaluating the reasonableness and fairness of the union's conduct/actions. An appeal opportunity to an independent review body also must be provided to Hotel Fox Partners, LLC if agreement with the union does not occur.

It is a well-established legal principle in Montana that it is unlawful for a legislative body to delegate or assign its legislative approval authority to a third party. This is especially a concern when there are no legislative body established standards, guidelines, or criteria by which to evaluate the third party's conduct/actions or inactions and when there is no appellate process for the applicant/developer. Several examples of instances where the Montana Supreme Court concluded that an unlawful delegation of legislative authority had occurred, include: (1) IN THE MATTER OF SAVINGS AND LOAN ACTIVITIES (1979) 182 Mont. 361, 597 P 2d 84 (declaring unconstitutional statute granting the Department of Business Regulation the power to approve or disapprove applications for the merger of savings and loan associations); (2) WHITE v. STATE, (1988) 759 P 2D 971 (declaring that the legislature unconstitutionally delegated authority to the Science and Technology Development Board); and (3) SHANNON v. CITY OF FORSYTH (1983) 666 P.2d 750, 752 (in the context of municipal zoning land use approvals, a consent ordinance requiring the consent of adjacent property owners/neighbors in order for a property owner to be able to locate a mobile home on their land was an unlawful delegation of legislative authority).

The Montana Supreme Court in SHANNON v. CITY OF FORSYTH (1983), 666 P.2d 750, 753 when explaining why a specific zoning consent ordinance was legally unacceptable and unlawful stated in part that:

“To be upheld as a lawful delegation of legislative authority, a ‘consent’ ordinance such as the one adopted by the *City of Forsyth* MUST CONTAIN STANDARDS OR GUIDELINES WHICH CAN BE USED BY A BOARD OF ADJUSTMENT TO JUDGE THE PROPRIETY OF A NEIGHBOR’S WITHHOLDING OF CONSENT . . . A CONSENT ORDINANCE WILL FAIL IF IT IS FOUND TO BE ARBITRARY OR CAPRICIOUS.

IN THIS CASE, WE FIND THAT THE ‘CONSENT’ ORDINANCE MUST FAIL ON BOTH COUNTS. THE ORDINANCE PROVIDES NO STANDARD WHATSOEVER BY WHICH CONSENTS MAY BE JUDGED. THE EFFECT OF THE ORDINANCE IS TO MAKE THE RIGHT TO LOCATE THE MOBILE HOME IN A ‘RESIDENTIAL A’ DISTRICT DEPENDENT WHOLLY ON THE WILL AND WHIM OF THE ADJOINING OWNERS AND 80% OF THE OWNERS WITHIN 300 FEET OF THE PROPERTY WITHOUT THE APPLICATION OF ANY SENSIBLE FIXED GUIDELINES OR STANDARDS, CALCULATED TO PROTECT THE INTERESTS OF ALL INHABITANTS. THE RESULT S UNEQUAL TREATMENT UNDER THE LAW. . . . THE ‘CONSENT’ ORDINANCE IS ALSO ARBITRARY AND CAPRICIOUS, SINCE THE EXERCISE OF A NEGATIVE VOTE BY ONE RESIDENT COULD DEFEAT THE SHANNONS’ PETITION. THE ARBITRARINESS OF THE ORDINANCE IS OBVIOUS WHEN THE SHANNONS’ ADJOINING NEIGHBORS, WHO LIVE IN A MOBILE HOME, CAN WITHHOLD THEIR CONSENT AND DENY THE SHANNONS THE RIGHT TO LOCATE A MOBILE HOME ON THEIR PROPERTY.” (*Emphasis added*)

It is a well-established legal principle in Montana that it is unlawful for a legislative body to allocate, assign, bestow, deliver or entrust a third party entity with the legislative body authority to control or approve a construction project.

CONCLUSION(S):

If the city council, as legislative body, allocates, assigns, bestows, delivers or entrusts its legislative authority and power to a third party to control or in essence approve whether a construction project is allowed to proceed to a third party, such as the UNITE HERE union, by mandating that the developer enter into a labor peace agreement with the union, without providing for any review or evaluation standards, guidelines or criteria of the reasonableness of union actions, inactions or conduct and does not provide for an independent appellate opportunity for the developer before construction may commence; the attempted legislative body delegation of legislative body authority constitutes an unreasonable unlawful delegation to a third party of the legislative body's power and authority to control or approve the construction project.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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