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Legal Opinion 2018-003

TO: City Council; Mayor John Engen; Dale Bickell; Mike Haynes; Denise Alexander; Don Verrue; Mary McCrea; Laval Means; Drew Larson; Anita McNamara; Jenny Baker; Ben Brewer; Jen Gress; Tom Zavitz; Donna Gaukler; Betsy Willett; Rod Austin; Tiffany Brander; Ellen Buchanan; Chris Behan; Ron Regan; Kevin Slovarp; Troy Monroe; John Wilson; Lori Hart; Leigh Griffing; Steve Johnson; Marty Rehbein; Kirsten Hands; Kelly Elam; Jane Kelly; Karen Gasvoda; Ginny Merriam

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE January 4, 2018

RE: Montana public constitutional and statutory rights to observe the deliberations of public municipal governing bodies, boards, authorities, committees, subcommittees or other entities created by a municipality and be afforded reasonable opportunity for citizen participation prior to public entity making a vote, decision, recommendation, approval, disapproval or other action or inaction that involves the use of discretionary authority

FACTS:

Four new city council members commence their elected city council terms of office this week. Further, recently there seems to be some puzzlement by some city staff members as to what municipal entity meetings must be public meetings with reasonable opportunity for citizen participation as well as citizen right to observe deliberations of the municipal public body that is meeting.

ISSUE(S):

What does Montana state law provide with respect to the public's right to observe the deliberations of public bodies, such as governing bodies, boards, authorities, committees, subcommittees and other entities created by a municipality?

CONCLUSION(S):

Generally, all meetings of municipal governing bodies, boards, authorities, committees, subcommittees or other entities shall be open to the public. With respect to public required open meetings, there are also associated public citizen rights to observe the deliberations of the public bodies, as well as for the public citizen to be afforded a reasonable opportunity to participate in the open public meeting prior to any final decision being made by the governing body, boards, authorities, committees, subcommittees, or other entities created by a municipality.

LEGAL DISCUSSION:

Pursuant to Montana's Constitutional rights of participation and right to know, the public has a Montana Constitutional mandated right to a reasonable opportunity for citizen participation prior to a final decision being made as well as right to observe the deliberations of all public bodies; except cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. See Montana Constitutional provisions "RIGHT OF PARTICIPATION" and "RIGHT TO KNOW" set forth below stating:

Section 8. **RIGHT OF PARTICIPATION.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Section 9. **RIGHT TO KNOW.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Title 2, chapter 3, Montana Code Annotated (MCA), is entitled, "PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS". Part 1 of title 2, chapter 3, MCA, is entitled, "NOTICE AND OPPORTUNITY TO BE HEARD". The initial section of law, section 2-3-101, MCA, provides that Article II, section 8 of Montana's Constitution pertaining to the Montana Constitutional right to participate in public body public meetings is a mandate that requires that the people of Montana have a right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to a final decision occurring. Section 2-3-101, MCA, provides:

2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency.

Also, sections 7-1-4142 and 7-1-4143, MCA, Montana's municipal government laws expressly require that each municipal governing body, committee, board, authority, or entity shall develop procedures for permitting and encouraging public participation in decisions that are of significant interest to the public and requires the municipal public body to adopt rules for conduct of the meeting affording citizens a reasonable opportunity to participate prior to final decisions being made. Sections 7-1-4142 and 7-1-4143 MCA states:

7-1-4142. Public participation. Each municipal governing body, committee, board, authority, or entity, in accordance with Article II, section 8, of the Montana constitution and Title 2, chapter 3, shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public.

7-1-4143. Participation. In any meeting required to be open to the public, the governing body, committee, board, authority, or entity shall adopt rules for conducting the meeting, affording citizens a reasonable opportunity to participate prior to the final decision.

With respect to the Montana Constitutional and statutory rights of citizens to observe the deliberations of each public body that is subject to Montana's public open meeting laws, in addition to Montana Constitutional provision, Article II, section 9, expressly establishing a public citizen right to observe the deliberations of a public body, Montana state law section 2-3-201, MCA, pertaining to public open meetings restates the right of the citizens to observe the deliberations of each public body by stating that "It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly."

"Official act" or "Official action" is defined in subsection 2-2-102(5), MCA, as meaning, "a vote, decision, recommendation, approval, disapproval or other action, including inaction, that involves the use of discretionary authority."

Public citizen Montana Constitutional and statutory rights to observe the public bodies deliberations is an extremely important right and reinforces the necessity that any discussion or deliberation of the items being considered by the respective public body must occur in a public open meeting.

Title 2, chapter 3, part 2, MCA, entitled, "OPEN MEETINGS" is the "part" that is referenced in the above quote from section 2-3-201 MCA. Section 2-3-201, MCA, is entitled, "LEGISLATIVE INTENT -- LIBERAL CONSTRUCTION" and states:

2-3-201. Legislative intent -- liberal construction. The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

Black's Law Dictionary, Eighth Edition, page 459 defines deliberations in pertinent part as carefully considering issues and options by analyzing, discussing and weighing the evidence.

A "meeting" is defined in section 2-3-202 MCA and includes hearing, discussing or acting upon a matter over which the public body has supervision, control, jurisdiction or advisory power. Section 2-3-202 MCA provides:

2-3-202. Meeting defined. As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in **2-3-203**, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

Section 2-3-203, MCA, also broadly defines the types of public bodies that are subject to Montana's public open meeting laws and includes committees and subcommittees of public bodies as entities that are subject to Montana's public open meeting laws. Section 2-3-203, MCA, is entitled, "MEETINGS OF PUBLIC AGENCIES AND CERTAIN ASSOCIATIONS OF PUBLIC AGENCIES TO BE OPEN TO PUBLIC – EXCEPTIONS", and states:

2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(6) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.

CONCLUSION(S):

Generally, all meetings of municipal governing bodies, boards, authorities, committees, subcommittees or other entities shall be open to the public. With respect to public required open meetings, there are also associated public citizen rights to observe the deliberations of the public bodies, as well as for the public citizen to be afforded a reasonable opportunity to participate in the open public meeting prior to any final decision being made by the governing body, boards, authorities, committees, subcommittees, or other entities created by a municipality.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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