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Legal Opinion 2020-012

TO: Mayor John Engen, City Council, Dale Bickell, Don Verrue, Jeremy Keene, Mary McCrae, Laval Means, Tom Zavitz, Jen Gress, Andrew Boughan, Emily Gluckin, Cassondra, Tripard, Dennis Bowman, Kevin Slovarp, Troy Monroe, Marty Rehbein, Kirsten Hands, Kelly Elam

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 2, 2020

RE: The Montana Supreme Court has held that with respect to zoning regulations it is essential to the validity and constitutionality of a municipal zoning regulation that there exist an appellate body to hear exceptional cases and grant variances with respect to applicability of zoning regulations

FACTS:

There are several new city staff and city council members. It is imperative that city staff and city officers are aware that it is essential to the validity and constitutionality of zoning regulations that there is an independent appellate body such as the zoning board of adjustment to consider exceptional cases with respect to the application of city zoning regulations.

ISSUE(S):

What has the Montana Supreme Court stated with respect to the importance of the provision of a municipal zoning board of adjustment with respect to the validity and constitutionality of municipal zoning ordinances?

CONCLUSION(S):

The Montana Supreme Court has stated that it is essential to the validity and constitutionality of a zoning ordinance that there be an appellate body, such as the zoning board of adjustment, with the power to hear exceptional cases and grant variances.

LEGAL DISCUSSION:

The Montana Supreme Court in *Freeman v. Board of Adjustment of City of Great Falls*, 97 Mont. 342, 35 P. 2d 534, 1934 Mont. LEXIS 89 involved an application by a person who leased a building and operated a neighborhood grocery store in a residential zoning district to build nearby in the residential zone a building that would be a combined neighborhood grocery store and residence. The City of Great Falls denied the application; but the zoning board of adjustment, district court and Montana Supreme Court each approved the application.

The Montana Supreme Court stated in part: supra at page 356 or 538:

“that the provision of a (zoning) board of adjustment (or similar fact-finding body), vested with broad general powers, is IMPORTANT TO THE VALIDITY OF THE ZONING ORDINANCE and the statute under which it was enacted. In the absence of such a board vested with power to prevent the inequalities and injustices which might otherwise result from a strict enforcement of the zoning ordinance, there could be GRAVE DOUBTS AS TO THE CONSTITUTIONALITY OF THE ORDINANCE AND STRICT ENFORCEMENT OF THE ORDINANCE and the statute under which it was enacted.” (emphasis added)

Later the Montana Supreme Court relied on and followed the *Freeman* decision in *Shannon v. City of Forsyth* 205 Mont. 111, 666 P. 2d 750, 1983 Mont. LEXIS 745 stating: that a zoning ordinance requiring the approval of 80% of landowners residing within 300 feet of a particular property before a variance may be granted was an unconstitutional delegation of legislative authority. It was the city council as legislative body that must decide such zoning matters, not the neighboring landowners. The Montana Supreme Court indicated supra at 752 that the city zoning ordinance deprived the applicant for a land use permit:

“. . . of due process and equal protection under the 1st and 14th Amendments to the United States Constitution and Article II, sections 4 and 17 of the Montana Constitution”.

Article II, section 4 of the Montana Constitution pertains in part to equal protection and Article II, section 17 of the Montana Constitution pertains to due process.

Later supra at 752 the Montana Supreme Court states that:

“In order for (an) ordinance to comply with the requirements essential to the exercise of police power . . . , it (is) essential that there should be an appellate body, such as the board of adjustment, with the power to consider exceptional cases.”

It is also noteworthy to note and emphasize that the Montana Attorney General in 38 Attorney General Opinion 98(1980) held that section 7-1-114 MCA prohibits a local legislative body from

providing for an optional appeal of decisions from the local zoning board of adjustment to the legislative body (Butte City Council) since section 76-2-327 MCA provides that appeal may only be to a court of record.

Also, noteworthy, is the fact that several Montana Supreme Court decisions have upheld the power of municipal zoning boards of adjustment to grant land use variances with respect to the use of the land. See for example *Rygg v. Kalispell Board of Adjustment*, 169 Mont. 93, 544 P 2d 1228, 1976 Mont. LEXIS 645; *Freeman v. Board of Adjustment City of Great Falls*, 97 Mont. 342, 34 P 2d 534, *Lambros v. City of Missoula*, 153 Mont. 20, 452 P 2d 398 and *Wheeler v. Armstrong*, 166 Mont. 363, 533 P. 2d 964, 1975 Mont. LEXIS 642.

CONCLUSION(S):

The Montana Supreme Court has stated that it is essential to the validity and constitutionality of a zoning ordinance that there be an appellate body, such as the zoning board of adjustment, with the power to hear exceptional cases and grant variances.

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/s/

Jim Nugent, City Attorney

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