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Legal Opinion 2011-008

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Ginny Merriam, Communications Director; Marty Rehbein, City Clerk; Nikki Rogers, Senior Deputy City Clerk; Kelly Elam, Secretary; Ellen Buchanan, MRA Director; Chris Behan, MRA; Donna Gaukler, Parks & Recreation Director; Anne Guest, Parking Commission Director; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Doug Waters, Cemetery Director; Brentt Ramharter, Finance Director; Phil Smith, Bike-Ped Coordinator; Don Verrue, Building Division Superintendent; Mark Muir, Police Chief ; Mike Brady, Assistant Chief of Police

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE April 22, 2011

RE: All city government boards, committees and commissions are required to adhere to Montana's right to know and public participation open meeting laws by providing advance public notice of meeting agendas setting forth items to be discussed and voted on

FACTS:

An issue recently arose involving a city advisory board suspending its rules and voting on a substantive matter that was not on the agenda. The situation reportedly resulted in there being no advance public notice that the substantive matter would be voted on.

ISSUE:

May city advisory boards, committees or commissions vote on substantive items that are not publicly noticed on their agenda in advance?

CONCLUSION:

No, all substantive items voted on by a public entity must be publicly noticed in advance on the agenda.

LEGAL DISCUSSION:

Pursuant to 51 Op. Att’y Gen. 12 the Montana Attorney General indicated any municipal entity in Montana, including an advisory board, committee, or commission is subject to the right of the public to participate in any action of significant interest to the public.

Montana’s constitutional rights of participation and right to know provisions expressly establish rights of the public to participate as well as observe the deliberations of all public bodies including boards, committees and commissions. Mont. Const. art. II, § 8 and § 9 provide:

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. (Emphasis added.)

Local governments are political subdivisions of state government. All municipal boards, committees and commissions are a public body of local municipal government.

Montana’s open meeting laws, pursuant to Mont. Code Ann. §§ 2-3-103 and 2-3-201 provide:

2-3-103. Public participation -- governor to ensure guidelines adopted.

(1) (a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public. The agenda for a meeting, as defined in 2-3-202, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in 2-3-212.

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies

and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request. (Emphasis added.)

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. (Emphasis added.)

The Montana Supreme Court has stated:

Additionally, Montana law requires that public notice be given of meetings subject to the requirements of the open meeting statutes. Board of Trustees, 606 P.2d at 1073. Without public notice, an "open" meeting is open in theory only, not in practice. Board of Trustees, 606 P.2d at 1073. In this case, the parties stipulated that no public notice was given of the Committee's November 20, 1992, meeting. We conclude, therefore, that the Committee violated § 2-3-203, MCA, of the open meeting statutes. (Emphasis added.)

Common Cause v. Statutory Comm. to Nominate Candidates for Comm' of Political Practices, 263 Mont. 324; 868 P.2d 604; 1994 Mont. LEXIS 24 ¶ 609 (1994).

CONCLUSION:

No, all substantive items voted on by a public entity must be publicly noticed in advance on the agenda.

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/s/

Jim Nugent, City Attorney
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