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Legal Opinion 2011-015

TO: John Engen, Mayor; City Council; Mike Barton; Nancy Harte; Bruce Bender; Brentt Ramharter; Dept. Atty.

FROM: Jim Nugent

DATE: August 12, 2011

RE: Municipal city council power to authorize contracts, including escrow agreements, binding on successor city councils.

FACTS:

Silvertip Housing, Inc. is developing the Silvertip Apartments for low- and moderate-income housing purposes. This housing project is to be located in the Hellgate Canyon in the City of Missoula. Silvertip Housing, Inc. borrowed \$6,736,500 from Wells Fargo Bank, National Association, which is insured by the United States Department of Housing and Urban Development (HUD). Further, the City of Missoula is contributing \$5,050,000 in Neighborhood Stabilization Program (NSP) grant funds to Silvertip Housing as a non-shareholder contribution to capital secured by a second mortgage lien on the housing project. Pursuant to an escrow agreement, HUD is causing the City to deposit \$80,636 in NSP funds to Wells Fargo Bank, National Association, to create an escrow fund for the sole purpose of funding construction costs of the housing project. This escrow deposit recently occurred as part of the closing of the loan. HUD requests a legal opinion on whether the City Council has power to enter into the escrow agreement and if such contract would be binding on future city councils and city employees.

ISSUE:

Does the City of Missoula have the power or authority to enter into an escrow agreement that would be binding on future city council members pursuant to which the City of Missoula is a funds grantor making an escrow deposit?

CONCLUSION:

Yes, the City of Missoula has the statutory power and authorization to enter into an escrow agreement that is binding on future city councils.

LEGAL DISCUSSION:

Missoula City Council has the power and authority to enter into contracts, including the power and authority to enter into an escrow agreement. The City of Missoula municipal government operates pursuant to a municipal self-government charter adopted by the city electors. Pursuant to Article II, section 6, of Montana's Constitution, a local government unit adopting self-government powers may exercise any power not prohibited by the Montana Constitution, Montana state law, or City of Missoula charter. Also see 7-1-4105(1) MCA.

Pursuant to Montana Constitution provision, Article XI, section 4(2), the powers of incorporated cities shall be liberally construed.

7-1-4124(4) MCA provides that a municipality has the power to contract with persons, corporations, or any other governmental entity. Also, 7-1-4124(8) and (9) MCA respectfully empower a Montana municipal government to: execute documents necessary to receive money, property, services, or other advantages from the state government, federal government, or any other source; and make grants and loans of money, property, and services for public purposes. Further, 7-5-4301(1) MCA provides that a city "is authorized to make any contracts necessary to carry into effect the applicable powers granted by title 7, chapter 5 MCA and to provide for the manner of executing the contracts."

Any contracts that the City Council authorizes are binding on future city elected officials and city employees. There is no provision in Montana state law that allows a future city council to undo, invalidate, or void prior contracts entered into by the city council. Two sections of Montana state law, 7-5-4103 and 7-5-4121 MCA, reference the city council's power and authority to determine the rules of its meetings as does the City of Missoula self-government city charter pursuant to provision, Article II, section 8. Pursuant to city council rule 20, reconsideration of any city council agenda item must occur before or during the second regular city council meeting after the city council has acted on any measure. It has been approximately 18 months since the City Council originally authorized city-commitment to the contract documents associated with this apartment project, so it is now well beyond any reconsideration time period pursuant to city council rules.

CONCLUSION:

Yes, the City of Missoula has the statutory power and authorization to enter into an escrow agreement that is binding on future city councils.

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Jim Nugent, City Attorney

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