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**CITY ATTORNEYS' OFFICE****CITY HALL, 435 RYMAN****MISSOULA, MT 59802****Phone: (406) 552-6020****Fax: (406) 327-2105**

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**LEGAL OPINION****2008-011**

**TO:** John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Roger Millar, OPG Director; Mike Barton, POG; Tim Worley, OPG; David Loomis, OPG; Jennie Dixon, OPG; Pat Kieley, OPG; Denise Alexander, OPG; Laval Means, OPG; Mary McCrea, OPG; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk's Office

**FROM:** Jim Nugent, City Attorney

**DATE** October 27, 2008

**RE:** Circumstances requiring favorable extraordinary majority City Council vote pursuant to Montana's municipal zoning protest statute in order to adopt zoning

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**FACTS:**

Monday evening October 27, 2008 the City Council will hold subdivision and zoning public hearings pertaining to proposed Stonybrook Annexation subdivision and zoning. With respect to the zoning public hearing there might be a Municipal zoning protest by adjacent and nearby property owners that could trigger the necessity for an extraordinary majority vote of City Council members in order to adopt the zoning.

**ISSUE:**

What does Montana's municipal zoning protest statute Section 76-2-305 MCA, provide with respect to city zoning public hearings involving some adjacent and nearby property owner protest?

**CONCLUSION:**

Montana's municipal zoning protest statute in Mont. Code Ann. § 76-2-305 provides the following significant provisions:

(1) Either the property owner(s) subject to the zoning proposal or qualifying neighboring real property owners may protest in writing and potentially trigger an extraordinary majority city council vote requirement if there is enough protest.

(2) A signed protest by the owners of 25% or more of either (a) the area of the lots included in any proposed change; or (b) those lots 150 feet from a lot included in a proposed change. and;

(3) If a statutory municipal zoning protest of at least 25% of the property owners from within one of the two statutory protest categories exists a zoning amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city council.

## **LEGAL DISCUSSION:**

Statutory municipal zoning protests that trigger an extraordinary super majority vote of the city council in order to enact a statutorily protested zoning proposal are common in the United States. They were a standard feature of what is commonly known and referred to as the original Standard Zoning Act.

McQuillan, Municipal Corporations, 3<sup>rd</sup> Edition Revised Volume 8A, § 25.248, pages 318-322 discusses statutory municipal zoning protests and property owner objections as follows:

### **§25.248. Protests and objections.**

Provision generally is made for the making of protests or objections to zoning changes by affected property owners or a certain percentage of them. Such a provision has been described as a limitation on the general powers of the municipal legislative body, required to be strictly enforced. . . . .

A common statutory provision, following that of the Standard Zoning Act, is that if an ordinance constitutes an attempt to amend, supplement, or change the regulations and districts established by a previous ordinance, a protest may be filed by specified property owners or a prescribed percentage of them, and in this event, a unanimous, or three-fourths, or other required vote of the city council is necessary for the passage of the ordinance. The purpose of such a provision is to confer a measure of added protection against unwanted or ill-considered change upon those property owners who would be most affected by it. A provision of this character is not invalid as an unlawful delegation of legislative authority to property owners. Such a provision is applicable to citywide as well as to piecemeal changes of the general plan of zoning. . . . " (*Emphasis added.*)

Rathkopf's The Law of Zoning and Planning, Volume 3, §43.1, pages 43-2 and 43-3 explains in its overview that:

“Protest provisions permit qualified neighboring owners to formally protest the enactment of a proposed zoning enactment. Valid protest petitions generally require that an extraordinary majority of the legislative body approve the proposal. . . .”

Mont. Code Ann. § 76-2-305 sets forth Montana's municipal zoning protest statute as follows:

**76-2-305. Alteration of zoning regulations -- protest.** (1) A regulation, restriction, and boundary may be amended, supplemented, changed, modified, or repealed. The provisions of 76-2-303 relative to public hearings and official notice apply equally to all changes or amendments.

(2) An amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city or town council or legislative body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of:

(a) the area of the lots included in any proposed change; or

(b) those lots 150 feet from a lot included in a proposed change.

*(Emphasis added.)*

This statutory protest provision expressly requires an extraordinary majority vote of the city council whenever there is a signed statutory protest by the real property owners of 25% or more of either the area of the lands included in the proposed zoning change or the owners of those lots located 150 feet from a lot included in a proposed change.

Also be aware that Montana Attorney General Joe Mazurek held in 46 Op. Att'y Gen. 5 (1995) that this statutory extraordinary vote requirement applied to municipal interim zoning authority holding:

HELD: The protest provisions in Mont. Code Ann. § 76-2-305(2) are available to affected landowners whenever an existing zoning regulation is changed within the scope of Mont. Code Ann. § 76-2-305(1) through exercise by a city or town council of its interim zoning authority under Mont. Code Ann. § 76-2-306.

Pursuant to subsection 2-15-201(7) MCA pertaining to the duties of an attorney general “the attorney general’s opinion is controlling unless overruled by a state district court or the supreme court.” Thus, the statutory extraordinary majority vote of the city council requirement applies to statutorily protested interim zoning as well.

## **CONCLUSION:**

Montana’s municipal zoning protest statute in Mont. Code Ann. § 76-2-305 provides the following significant provisions:

(1) Either the property owner(s) subject to the zoning proposal or qualifying neighboring real property owners may protest in writing and potentially trigger an extraordinary majority city council vote requirement if there is enough protest.

(2) A signed protest by the owners of 25% or more of either (a) the area of the lots included in any proposed change; or (b) those lots 150 feet from a lot included in a proposed change. And;

(3) If a statutory municipal zoning protest of at least 25% of the property owners from within one of the two statutory protest categories exists a zoning amendment may not become

effective except upon a favorable vote of two-thirds of the present and voting members of the city council.

OFFICE OF THE CITY ATTORNEY

A handwritten signature in black ink that reads "Jim Nugent". The signature is written in a cursive style with a horizontal line extending from the top of the "t".

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Jim Nugent, City Attorney

JN:mdg

cc: Legal Staff