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**OFFICE OF THE CITY ATTORNEY**

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**Legal Opinion 2008-014**

**TO:** John Engen, Mayor; City Council; Bruce Bender, CAO; Roger Millar, OPG Director; Mary McCrea, OPG; Janet Rhoades, OPG; Denise Alexander, OPG; Tim Worley, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Public Works; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Donna Gaukler, Parks & Recreation, Jackie Corday, Parks & Recreation; David Shaw, Parks & Recreation

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** October 28, 2008

**RE:** City Council denial of a subdivision application proposal triggers a statutory requirement that City Council shall prepare a written statement both identifying subdivision regulations and statutes used to reach the decision to deny the subdivision as well as providing the facts and conclusions the governing body relied upon in making its decision to deny.

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**FACTS:**

After a nearly three and one-half (3 ½) hour public hearing on proposed Stony Brook subdivision Monday evening, October 28, 2008, the purpose of this legal opinion is to generally provide Montana Subdivision and Platting Act statutory information about the written statement that a City council governing body must provide when denying a proposed subdivision application in the event a majority of the City council denies the proposed Stony Brook subdivision.

**ISSUE:**

If the City Council denies or conditionally approves a proposed subdivision application, what are the City Council's statutory duties pursuant to the *Montana Subdivision and Platting Act* with respect to providing a written statement informing the applicant of the regulations and statutes used to reach the decision to deny or conditionally approve the subdivision application?

## **CONCLUSION:**

Pursuant to Mont. Code Ann. § 76-3-620 of the Montana Subdivision and Platting Act, if a city council denies or conditionally approves a subdivision application, the city council as a governing body shall prepare a written statement that must be provided to the applicant including information about the appeal process, identifies regulations and statutes used in reaching the decision and provides facts and conclusions that reference documents, testimony, or other materials that form the basis of the decision.

## **LEGAL DISCUSSION:**

The *Montana Subdivision and Platting Act* is set forth in Title 76, chapter 3 Montana Code Annotated. Part 6 of title 76 chapter 3 is entitled "Local Review Procedure." Section 76-3-604 MCA is entitled "Review of Subdivision Application—review for required elements and sufficiency of information." Subsections 76-3-604(3) through (8) MCA provide:

(3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

(a) a determination is made that the application contains the required elements and sufficient information; and

(b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

(a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or

(b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

(5) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature, that complies with the provisions of 76-3-620.

(6) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to 76-3-622 and shall make any comments submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(7) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-622, that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

(8) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations. (Emphasis added.)

Section 76-3-620 MCA, which is cross referenced in subsection 76-3-604(5) MCA above, provides:

**76-3-620. Review requirements—written statement.** In addition to the requirements of 76-3-604 and 76-3-609, following any decision by the governing body to deny or conditionally approve a proposed subdivision, the governing body shall prepare a written statement that must be provided to the applicant, that must be made available to the public, and that:

(1) includes information regarding the appeal process for the denial or imposition of conditions;

(2) identifies the regulations and statutes that are used in reaching the decision to deny or impose conditions and explains how they apply to the decision to deny or impose conditions;

(3) provides the facts and conclusions that the governing body relied upon in making its decision to deny or impose conditions and references documents, testimony, or other materials that form the basis of the decision; and

(4) provides the conditions that apply to the preliminary plat approval and that must be satisfied before the final plat may be approved. (Emphasis added.)

Mont. Code Ann. § 76-3-625 of the *Montana Subdivision and Platting Act* also authorizes lawsuits against local governments with respect to their subdivision decisions. Mont. Code Ann. § 76-3-625 provides:

**76-3-625. Violations—actions against governing body.**

(1) A person who has filed with the governing body an application for a subdivision under this chapter may bring an action in district court to sue the governing body to recover actual damages caused by a final action, decision, or order of the governing body or a regulation adopted pursuant to this chapter that is arbitrary or capricious.

(2) A party identified in subsection (3) who is aggrieved by a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat may, within

30 days after the decision, appeal to the district court in the county in which the property involved is located. The petition must specify the grounds upon which the appeal is made.

(3) The following parties may appeal under the provisions of subsection (2):

(a) the subdivider;

(b) a landowner with a property boundary contiguous to the proposed subdivision or a private landowner with property within the county or municipality where the subdivision is proposed if that landowner can show a likelihood of material injury to the landowner's property or its value;

(c) the county commissioners of the county where the subdivision is proposed; and

(d) (i) a first-class municipality, as described in 7-1-4111, if a subdivision is proposed within 3 miles of its limits;

(ii) a second-class municipality, as described in 7-1-4111, if a subdivision is proposed within 2 miles of its limits; and

(iii) a third-class municipality or a town, as described in 7-1-4111, if a subdivision is proposed within 1 mile of its limits.

(4) For the purposes of this section, "aggrieved" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision. (Emphasis added.)

## **CONCLUSION:**

Pursuant to Mont. Code Ann. § 76-3-620 of the Montana Subdivision and Platting Act, if a city council denies or conditionally approves a subdivision application, the city council as a governing body shall prepare a written statement that must be provided to the applicant including information about the appeal process, identifies regulations and statutes used in reaching the decision and provides facts and conclusions that reference documents, testimony, or other materials that form the basis of the decision.

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Jim Nugent, City Attorney

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