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Legal Opinion 2008-015

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Roger Millar; OPG Director; Cindy Wulfekuhle, OPG; Mike Barton, OPG; Denise Alexander, OPG; Mary McCrea, OPG; David Loomis, OPG; Jennie Dixon, OPG; Tom Zavaritz, OPG; Mark Landkammer, OPG; Zachary Brandt, OPG; Jen Gress, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Public Works; Linda Dunn, Pubic Works Office Manager

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE October 30, 2008

RE: Non public record *ex parte* communications, meetings, or discussions should be avoided by City Council and Mayor with respect to specific subdivision and/or zoning land use projects.

FACTS:

The City has four (4) new City Council members since the last time this topic was a subject of a written legal opinion. Currently a controversial proposed subdivision and zoning application is before the City Council. Thus, it seems appropriate to provide City elected officials a reminder about avoiding *ex parte* communications with respect to pending land use decisions related to subdivision or zoning.

ISSUE:

With respect to pending land use subdivision or zoning applications, should City elected officials responsible for making final decisions avoid non-public record communications and/or discussions with interested parties or concerned citizens pertaining to the land use project prior to the city council making a final decision as the governing body?

CONCLUSION:

City Council members and the Mayor who are responsible for making final decisions with respect to subdivision and zoning applications should avoid non-public record communications, meetings, and/or discussions with interested parties or concerned citizens pertaining to the land use proposal prior to a final decision being made.

LEGAL DISCUSSION:

Montana's Constitutional and statutory right to participate and right to know are very important citizen rights associated with any proposed subdivision or zoning applications.

In order to avoid potential invalidation of a City Council decision pertaining to a specific land use subdivision or zoning proposal or land use project, as well as to protect constitutional due process for interested parties, and avoid even the appearance of bias or prejudgment of the land use issues, elected City decision makers should avoid non-public record communications meetings and/or discussions with interested parties or concerned citizens that are not open to the public that occur prior to a final decision being made. It is elementary basic fairness to adhere to both the public right to know as well as the public right to reasonably participate prior to a final decision being made by City elected officials. It also is important for land use decision makers to avoid weakening public confidence or undermining a sense of security of individual property owner rights as well as to an impartial, fair public process with respect to land use decision making for specific subdivision and zoning application proposals or projects.

City elected official decision making with respect to a property owner zoning or subdivision application is often generally considered to be a quasi-judicial function where *ex parte* contacts on the merits of the zoning or subdivision application could be held to violate constitutional rights to due process, right to know, right to participate, etc.

Zeigler, in *Rathkopf's The Law of Zoning and Planning*, section 32.10, when discussing *ex parte* contacts, states:

II. *EX PARTE* CONTACTS § 32:10 Generally

Political pressure and lobbying are a routine part of the zoning process. However, secret meetings and *ex parte* (off the record) discussions between interested parties and members of a zoning body may be held to violate statutory provisions requiring that meetings be noticed and open to the public. Also, while lobbying and *ex parte* discussions concerning the merits of a zoning proposal generally are held to be permissible and lawful with respect to purely legislative matters, where a zoning body performs quasi-judicial or administrative functions, *ex parte* contacts on the merits of an application may be held to violate procedural due process where an interested party's rights to notice and affair opportunity to be heard are prejudicial thereby. (Emphasis added.)

Ziegler in *Rathkopf's The Law of Zoning and Planning*, section 32.13 addresses legal concerns pertaining to denial of a fair hearing stating:

§32:13 Denial of fair hearing: Administrative action

When a zoning body takes administrative action affecting a person's property rights with respect to the use of a specific tract of land, procedural due process requires that the affected person be given notice and a fair opportunity be heard. This due process right to a "fair hearing on the issues involved clearly prohibits any use of secret evidence or secret reports that have the effect of denying the person involved a fair opportunity to proffer rebuttal testimonial and evidence. *Ex parte* contacts and communications related to the merits of an administrative zoning decision are considered highly improper and may be held sufficient to prejudice the affected person's procedural due process rights to a "fair hearing" or a similar statutory right to a "public hearing."

Courts in some cases have extended the right to a fair opportunity to be heard to not only applicants for zoning relief but to persons such as neighboring owners, who are objecting to the relief sought by an applicant. However, courts generally hold that *ex parte* contacts will invalidate an administrative zoning decision only where the contacts or communications involved are such as to substantially prejudice the affected party's right to notice and a fair hearing.

[. . .]

Washington courts have developed an "appearance of fairness" doctrine whereby administrative or quasi-judicial decisions by a legislative body may be held invalid where the cumulative impact of *ex parte* communications causes the proceedings to appear unfair to the general public. [Emphasis added.]

Ziegler, in *Rathkopf's The Law of Zoning and Planning*, discusses land use decision making bias, conflict of interest and the appearance of fairness doctrines:

BIAS AND CONFLICTS OF INTEREST

§ 32:14 Generally

Conflict of interest or bias on the part of a legislative or administrative decisionmaker may be alleged in litigation seeking to overturn a zoning enactment or decision. With respect to adjudicative or quasi-judicial zoning action (the grant of a variance or special permit, approval of a site plan, subdivision plat, or special exception, and in some states, the rezoning of a particular parcel of land), procedural due process generally prohibits bias or conflict of interest on the part of zoning officials involved in the decision process. Courts hold that when a public official functions in an adjudicative capacity special due process standards apply. Concern for the impartial exercise of quasi-judicial authority, in appearance as well as fact, requires that decisionmakers disqualify themselves where bias or conflicts of interest can be shown.

[. . .]

Administrative tribunals must be unbiased and must avoid even the appearance of bias to be in accordance with the principles of due process. As stated by the Supreme Court of Pennsylvania:

[A] predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative

of due process. Merely, a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true' is sufficient.

Generally, conflict of interest or bias affecting the appearance of impartiality in zoning proceedings may be shown by: (1) a personal or financial interest that may be directly or indirectly affected by the zoning decision; (2) partiality or prejudice stemming from associational ties, familial relationships, friendships, employment or previous business dealings or conduct during the proceeding; or (3) prejudgment of the issues, which is usually revealed by pre-hearing statements. (Emphasis added.)

§ 32:17 Appearance of fairness doctrines

Court decisions in a number of states have developed "appearance of fairness" doctrines that attempt to restrict and prohibit conflicts of interest and bias that may undermine public confidence in the integrity of the zoning decisionmaking process. These doctrines may be based on state public policy, the spirit of statutory restrictions, the right to a statutorily required fair hearing, or simply judicial interpretation of the special due process standards governing adjudicatory action. While these doctrines generally are not strictly applied to purely legislative action, they may well be applied in conflict situations to members of local legislative bodies when acting in a quasi-judicial or administrative capacity and when the action of the public official involved is not expressly prohibited by statute.

Early Connecticut court decisions established conflicts of interests principles governing disqualification of members of zoning bodies. Courts in that state have reaffirmed the principle "that public policy requires that members of such public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty." The evil against which the policy is directed "lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power. It is "the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest."

2 Ziegler, *Rathkopf's The Law of Zoning and Planning* §§ 32:14 and 32:17.

Montana's Constitution and state statutes constitutionally and statutorily guarantee citizen public participation and public right to know prior to final decision making. Montana's Constitution and State statutes require that decision making occur in public meetings based on public record. City Council member discussion about proposed subdivision, zoning, or other land use projects or proposals that the City Council will determine should be discussed among city council members only at public meetings prior to a final decision.

Montana's Constitution Article II, Sections 8 and 9, creates constitutional rights for public participation in government operations prior to a final decision being made as well as public rights to know, to examine documents and observe the deliberations of all public bodies. These constitutional provisions 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. (*Emphasis added.*)

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.*)

These constitutional rights are also statutorily established in Title 2, Chapter 3, parts 1 and 2, Montana Code Annotated, pertaining to public participation, notice, opportunity to be heard and open meetings as well as in Montana's municipal government operation statutes §§ 7-1-4141 through 7-1-4143:

7-1-4141. Public meeting required. (1) All meetings of municipal governing bodies, boards, authorities, committees, or other entities created by a municipality shall be open to the public except as provided in 2-3-203.

(2) Appropriate minutes shall be kept of all public meetings and shall be made available upon request to the public for inspection and copying.

7-1-4142. Public participation. Each municipal governing body, committee, board, authority, or entity, in accordance with Article II, section 8, of the Montana constitution and Title 2, chapter 3, shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public. (*Emphasis added.*)

7-1-4143. Participation. In any meeting required to be open to the public, the governing body, committee, board, authority, or entity shall adopt rules for conducting the meeting, affording citizens a reasonable opportunity to participate prior to the final decision. (*Emphasis added.*)

City Council land use decisions pertaining to a specific zoning or subdivision proposal or other use of land in a certain manner clearly directly significantly affect specific individual property owner rights as well as potential community interests. City Council/Mayor governing body land use decisions potentially involve several constitutional issues including equal protection, due process, procedural due process fairness and takings of property requiring just compensation. Constitutional due process requires notice as well as a reasonable, fair and impartial opportunity to be heard. Fairness and impartiality to be heard also require that the process is impeccably a public record process pursuant to law.

Local government land use decisions must be considered on their merits based on public record evidence and information and not on *ex parte*, non-public record, discussion, meeting, or lobbying efforts. *Black's Law Dictionary* 472-473 (7th ed. 2000) defines the term "*ex parte*" as:

ex parte adv. On or from one party only, usu. without notice to or argument from the adverse party.

ex parte adj. Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested.

***ex parte* communication.** A generally prohibited communication between counsel and the court when opposing counsel is not present.

Also see *Black's Law Dictionary*, Eighth Edition, pages 616-617 and page 296.

CONCLUSION:

City Council members and the Mayor who are responsible for making final decisions with respect to subdivision and zoning applications should avoid non-public record communications, meetings, and/or discussions with interested parties or concerned citizens pertaining to the land use proposal prior to a final decision being made.

OFFICE OF THE CITY ATTORNEY

A handwritten signature in cursive script that reads "Jim Nugent". The signature is written in black ink and is positioned below the text "OFFICE OF THE CITY ATTORNEY".

Jim Nugent, City Attorney

JN: mdg