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Legal Opinion 2009-007

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Doug Harby, Project Engineer; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk's Office; Donna Gaukler, Parks & Rec Director; Jackie Corday, Parks & Rec; Roger Millar, OPG Director; Mike Barton, OPG; Mary McCrea, OPG; Denise Alexander, OPG

FROM: Jim Nugent

DATE: March 9, 2009

RE: There is no existing Montana municipal zoning statute or case law that requires a City Council to enter written findings in support of municipal zoning decisions

FACTS:

Some concerns appear to exist with respect to the City zoning code update and potential written findings about potential zoning regulation revisions.

ISSUE(S):

Pursuant to existing Montana law is a city council required to issue written findings with respect to its zoning decisions?

CONCLUSION(S):

No. Pursuant to existing Montana municipal zoning statutes and Montana Supreme Court case law there is no current requirement that a city council issue written findings with respect to its zoning decisions. In fact, the Montana Supreme Court stated in Foster v. City of Bozeman, 189 Mont. 614, P.2d 1072, 1980 Mont. LEXIS 802, that there was not any existing statute or case law that required a city council when hearing a rezoning application to enter findings in support of its decision.

LEGAL DISCUSSION:

There is no Montana municipal zoning statute that requires a city council to issue written findings in support of its zoning decisions. Further, there is no Montana Supreme Court case law decision that specifically requires a city council to issue written findings in support of its zoning decisions.

In fact, the Montana Supreme Court in Foster stated supra at 71-72,

There is neither existing statutory law nor Montana case law requiring this procedure, and it is difficult for us to determine that the City Commission nonetheless had a mandatory duty to keep such a record. The fact that Foster did have a record if he chose to use it, obviates any prejudice occurring because of an absence of a record. It is difficult for us to see how he could claim in District Court that review was inadequate because the city had not recorded the proceedings, but where he actually had his own record of the proceedings.

Nor is there any existing statutory or case law in this state which requires a City Commission when hearing a rezoning application, to enter findings in support of its decision. (Emphasis added.)

In Foster the Bozeman City Commission had denied a landowner's request that the zoning classification on his land be changed from agricultural to a single family residential zoning classification. The landowner then sought a writ of mandamus to compel the Bozeman City Commission to grant a rehearing and to issue findings in support of the City Commission's decision. While the District Court had originally granted the writ, the Montana Supreme Court reversed stating that there was no legal basis for the District Court to grant the writ.

5-29 Zoning Law and Practice §29-6 pertaining to mandamus and denial of writs of mandamus states as follows in Footnote 84:

Footnote 84. Addis v. Smith, 225 Ga. 157, 166 S.E.2d 361 (1969) (restating basic principle of zoning law that it is not function of court to zone or rezone). See also Foster v. City Comm'n of & for City of Bozeman, 189 Mont. 64, 614 P.2 1072 (1980) (no constitutional, statutory or ordinance requirements that city commission enter written findings in support of rezoning decisions, maintain verbatim record of proceedings, or provide due process procedural safeguards of an adjudicatory nature). (Emphasis added.)

This municipal zoning law should not be confused with Montana subdivision law. The Montana Subdivision and Platting Act set forth in Title 76, Chapter 3 MCA statutorily specifically requires the city council to issue written findings. For example, §§76-3-511(2) and (3), 76-3-608(4); 76-3-615(3) and 76-3-620 MCA.

Montana's municipal zoning statutes do not contain similar statutory provisions that require the city council to issue written findings in support of a city council municipal zoning decision.

It is also important to note that pursuant to Montana's statutory rules of statutory construction (interpretation) it is inappropriate for the judge or anyone interpreting a statute to insert language that the Montana State Legislature has omitted.

Section 1-2-101 MCA of Montana's Rules of Statutory Construction state:

1-2-101. Role of the judge – preference to construction giving each provision meaning. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (Emphasis added.)

The Montana Supreme Court has held that it is not the role of the courts to supply statutory omissions. In construing statutes courts cannot insert what has been omitted. See State ex.rel. Palmer v. Hart, 201 M 526, 655 P.2d 965 (1982); Skrukrud v. Gallatin Laundry Co., Inc., 171 M 217, 557 P.2d 278 (1976).

Montana courts may not insert a requirement into municipal zoning statutes that requires a city council to issue findings with respect to the city council zoning decisions.

CONCLUSION(S):

No. Pursuant to existing Montana municipal zoning statutes and Montana Supreme Court case law there is no current requirement that a city council issue written findings with respect to its zoning decisions. In fact, the Montana Supreme Court stated in Foster v. City of Bozeman, 189 Mont. 614, P.2d 1072, 1980 Mont. LEXIS 802, that there was not any existing statute or case law that required a city council when hearing a rezoning application to enter findings in support of its decision.

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JN:jlw