

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2012-004

**TO:** Mayor John Engen, City Council, Bruce Bender, Denise Alexander, Laval Means, Jen Gress, Tom Zavitz, Don Verrue, Marty Rehbein, Nikki Rogers

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** March 11, 2013

**RE:** Property owner municipal zoning protests that trigger requirement of extraordinary majority vote of City Council to adopt the municipal zoning proposal

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### FACTS:

In the next few weeks there may be significant property owner zoning protests against a proposed zoning regulation amendment pertaining to accessory dwelling units that could be sufficient to trigger a state law requirement that it take an extraordinary majority of two-thirds of those city council members present and voting in order for the zoning amendment to be adopted.

### ISSUE(S):

- (1) Pursuant to Montana municipal zoning law what property owner zoning protest is required in order to be sufficient to trigger a requirement that an extraordinary majority vote of the city council is necessary in order to adopt the zoning regulation amendment?
- (2) If there is a sufficient property owner written zoning protest, what would be the minimum extraordinary vote requirement in order for the city council to be able to approve the zoning proposal?

### CONCLUSION(S):

- (1) Pursuant to section 76-2-305 MCA, a sufficient property owner zoning protest may be established that would require an extraordinary majority vote of the city council, if the property owners of 25% or more of (a) the area of the lots included in any proposed change; or (b) those lots or units, as defined in 70-23-102, 150 feet from a lot included in a proposed change submit written property owner protests.
- (2) If there is a sufficient property owner written zoning protest, in order for the city council to approve the zoning proposal it would take “a favorable vote of two-thirds of the present and

voting members of the city” council. See subsection 76-2-305(2) MCA. Also, see subsection 20.85.040(H) of the Missoula Municipal Code.

### **LEGAL DISCUSSION:**

Subsection 7-1-114(1)(e) MCA pertaining to mandatory provision of Montana State Law provides that local governments with self government powers are subject to all laws that require or regulate planning or zoning. Title 76, chapter 2, part 3 MCA is entitled “MUNICIPAL ZONING”. Section 76-2-305 MCA of this part is entitled “ALTERATION OF ZONING REGULATIONS-PROTEST” and provides 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 or units, as defined in [70-23-102](#), 150 feet from a lot included in a proposed change.

(3) (a) For purposes of subsection (2), each unit owner is entitled to have the percentage of the unit owner's undivided interest in the common elements of the condominium, as expressed in the declaration, included in the calculation of the protest. If the property, as defined in [70-23-102](#), spans more than one lot, the percentage of the unit owner's undivided interest in the common elements must be multiplied by the total number of lots upon which the property is located.

(b) The percentage of the unit owner's undivided interest must be certified as correct by the unit owner seeking to protest a change pursuant to subsection (2) or by the presiding officer of the association of unit owners. (emphasis added)

A 2011 Montana State Legislative Amendment inserted Subsections 76-2-305(2)(b) and (3) MCA pertaining to “units” and the method of determining unit owner’s undivided interest. Subsection 76-2-305 (2)(b) MCA quoted above cross references to section 70-23-102 MCA with respect to “units”. Section 70-23-102 MCA is part of the “UNIT OWNERSHIP ACT” pertaining to condominiums, townhomes and townhouses. Section 70-23-102 MCA is the definitions section for the “UNIT OWNERSHIP ACT”. The three definitions directly pertaining to “units” are set forth in subsections 70-23-102 (15) through (17) MCA which provide as follows:

**70-23-102. Definitions.** In this chapter, unless the context requires otherwise, the following definitions apply:

(15) "Unit" means a part of the property including one or more rooms occupying one or more floors or a part or parts of the property intended for any type of independent use and with a direct exit to a public street or highway or to a common area or area leading to a public street or highway.

(16) "Unit designation" means the number, letter, or combination of numbers and letters

designating a unit in the declaration.

(17) "Unit owner" means the person owning a unit in fee simple absolute individually or as co-owner in any real estate tenancy relationship recognized under the laws of this state. However, for all purposes, including the exercise of voting rights, provided by lease filed with the presiding officer of the association of unit owners, a lessee of a unit must be considered a unit owner.

Except for the 2011 Montana state legislative amendments, the Montana municipal zoning law provisions are basically set forth in Missoula Municipal Code subsection 20.85.040(H) MMC as well. This subsection provides:

**20.85.040 Zoning Amendments**

A regulation or boundary may be altered, supplemented, changed, modified or repealed subject to the following procedures.

**H. Protest Petitions**

1. A formal protest petition opposing a zoning amendment must be submitted to the zoning officer or on the public record before the City Council's vote, allowing sufficient time for the city clerk to determine the validity of the petition.

2. A protest petition will be considered "valid" if it is signed by the owners of 25% or more of:

a. the area of the parcels that are the subject of the proposed change; or

b. the parcels or units, as defined in MCA 70-23-102, within 150 feet of the parcel that is the subject of the proposed change. The area per unit to be included in the calculation of the protest shall be determined per MCA 76-2-305.

3. When a valid protest petition has been submitted, approval of a zoning amendment requires a 2/3 majority vote of those City Council members present and voting.

**CONCLUSION(S):**

(1) Pursuant to section 76-2-305 MCA, a sufficient property owner zoning protest may be established that would require an extraordinary majority vote of the city council, if the property owners of 25% or more of (a) the area of the lots included in any proposed change; or (b) those lots or units, as defined in 70-23-102, 150 feet from a lot included in a proposed change submit written property owner protests.

(2) If there is a sufficient property owner written zoning protest, in order for the city council to approve the zoning proposal it would take "a favorable vote of two-thirds of the present and voting members of the city" council. See subsection 76-2-305(2) MCA. Also, see subsection 20.85.040(H) of the Missoula Municipal Code.

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/s/ \_\_\_\_\_

Jim Nugent, City Attorney

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