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Legal Opinion 2007-025

TO: John Engen, Mayor; City Council; Bruce Bender; Roger Millar; Jennie Dixon; Mike Barton; Tim Worley; Denise Alexander; Mary McCrea; Marty Rehbein; Nikki Rogers; Steve King; Kevin Slovarp; Carla Krause; Dept. Atty

FROM: Jim Nugent, City Attorney

DATE December 13, 2007

RE: Zoning compliance permits for unzoned lands pursuant to City Council adopted regulations

FACTS:

The subdivision reviews before the City Council during December 2007 have generated City Council PAZ committee discussion pertaining to unzoned lands. There is no provision in the Montana Subdivision and Platting Act set forth in title 76, chapter 3 MCA that requires an extraordinary majority vote of a City Council for any reason in order to approve a subdivision. Also, there is no statutory requirement in the Montana Subdivision and Platting Act that land be zoned as a prerequisite to being subdivided.

ISSUES:

1. What are the City Council-adopted zoning regulation criteria requirements for issuing a zoning compliance permit for development of unzoned land?
2. If the Office of Planning and Grants Staff Zoning Officer does not issue a zoning compliance permit, whom may the applicant for a zoning permit appeal to?

CONCLUSIONS:

1. Pursuant to subsection 19.70.010 Missoula Municipal Code, the City Council has pursuant to zoning ordinance established the following requirements for the City

Zoning Officer to review in order to determine eligibility to obtain a zoning compliance permit:

1. Is the proposed development consistent with the county zoning classification in effect at the time of annexation?
2. Is the proposed development in compliance with the land use activities designated by the comprehensive plan for that parcel, or is the proposed development different from activities designated by the comprehensive plan, but consistent with the goals, objectives and/or policies of the comprehensive plan?
3. Is the proposed development within an approved subdivision, and does the proposed development meet the purpose and conditions of the subdivision?
4. Is the proposed development substantially the same as or compatible with the actual uses, or potential land uses based on zoning or comprehensive plan designations, of 50% or more of the area of properties within 300 feet of the property proposed for development?

If the answer is in the affirmative to any two of these questions, and the application is determined in all other portions to be complete, the Zoning Officer may issue a Zoning Compliance Permit or may defer the matter to the City Council. If the Zoning Officer cannot respond affirmatively to two of these questions, s/he shall not issue a Zoning Compliance Permit. The appeal procedure outlined in Subsection I shall apply.

2. Pursuant to subsection 19.70.010(I) Missoula Municipal Code, an applicant may appeal a zoning officer's determination of ineligibility for a zoning compliance permit to the City council within five (5) working days of the Zoning Officer's decision. Also, pursuant to section 76-2-326 MCA, any person aggrieved by an administrative zoning decision of an administrative Zoning Officer may appeal that decision to the Municipal Zoning Board of Adjustment. Two Montana Supreme Court decisions provide that it is essential that there be an appellate body such as a Zoning Board of Adjustment for zoning regulations to be constitutional.

LEGAL DISCUSSION:

The Missoula City Council has adopted section 19.70.010 Missoula Municipal Code (MMC) as a Missoula zoning regulation. Due to the several page length of section 19.70.010 MMC, it is attached hereto for those who desire to read it in its entirety.

Subsection 19.70.010(D) MMC is entitled “Requirements for Issuing a Zoning Compliance Permit for Development of Unzoned Land.” Subsection 19.70.010(D) provides:

D. Requirements for Issuing a Zoning Compliance Permit for Development of Unzoned Land.

If any land located within the city has not yet been zoned by the city, a Zoning Compliance Permit for a primary structure or activity, or an accessory structure or activity, may be issued by the Zoning Officer if the proposal is eligible according to the following requirements. To determine eligibility of an application for a Zoning Compliance Permit the Zoning Officer shall ask the following:

1. Is the proposed development consistent with the county zoning classification in effect at the time of annexation?
2. Is the proposed development in compliance with the land use activities designated by the comprehensive plan for that parcel, or is the proposed development different from activities designated by the comprehensive plan, but consistent with the goals, objectives and/or policies of the comprehensive plan?
3. Is the proposed development within an approved subdivision, and does the proposed development meet the purpose and conditions of the subdivision?
4. Is the proposed development substantially the same as or compatible with the actual uses, or potential land uses based on zoning or comprehensive plan designations, of 50% or more of the area of properties within 300 feet of the property proposed for development?

If the answer is in the affirmative to any two of these questions, and the application is determined in all other portions to be complete, the Zoning Officer may issue a Zoning Compliance Permit or may defer the matter to the City Council. If the Zoning Officer cannot respond affirmatively to two of these questions, s/he shall not issue a Zoning Compliance Permit. The appeal procedure outlined in Subsection I shall apply. (Emphasis added.)

Subsection 19.70.010(D) MMC cross-references subsection 19.70.010(I) MMC with respect to appeals of the Zoning Officer’s decision. Subsection 19.70.010(I) is entitled “Appeal by Applicant for Zoning Compliance Permit on Unzoned Land.” Subsection 19.70.010(I) MMC provides:

I. Appeal by Applicant for Zoning Compliance Permit on Unzoned Land.

1. If it is the Zoning Officer's determination that an area is not eligible for a Zoning Compliance Permit according to the requirements of this chapter the applicant may appeal the Zoning Officer's determination of non-compliance to the City Council. Appeal must be filed within five working days of date of determination. The appeal must be in writing and submitted to the Planning Office, which is responsible for distributing a copy to the City Clerk and referring the request for a hearing to City Council. Once a hearing date is set by the City Council, notice of the public meeting at which the City Council hears the appeal shall be published 15 days prior to the meeting describing the location of the property, the nature of the proposed use, the Zoning Officer's determination, and the time, place and date of the hearing. The subject property shall be posted. The public shall be allowed an opportunity to comment at the hearing. Any appeal from the decision of the City Council shall be made to the District Court within thirty calendar days. (Emphasis added.)

It must also be noted that pursuant to section 76-2-326 MCA, administrative zoning decisions may be appealed by an aggrieved party to the Municipal Zoning Board of Adjustment. Further, the Montana Supreme Court has in at least two decisions indicated that a board of adjustment vested with broad general powers is important to validity of a zoning ordinance as well as statute pursuant to which it was enacted in order to prevent inequalities and injustices which might otherwise result from strict enforcement of a zoning ordinance otherwise there would be grave doubts as to constitutionality of ordinance and statute.

The Montana Supreme Court in *Freeman v. Board of Adjustment of City of Great Falls*, 34 P.2d 534, 538-539 (1934) stated:

It is therefore apparent that the provisions for a board of adjustment (or similar fact-finding body), vested with broad general powers, is important to the validity of the zoning ordinance and the statute under which it was enacted. In the absence of such a board vested with power to prevent the inequalities which might otherwise result from a strict enforcement of the statute under which it was enacted. *St. Basil's Church of City of Utica v. Kerner, supra.* [. . .] In power in the particular mentioned it was essential that there should be an appellate body, such as the board of adjustment, with the power to consider exceptional cases. The board found that this was an exceptional case. (Emphasis added.)

The Montana Supreme Court in *Shannon v. City of Forsyth*, 666 P.2d 750, 752-753 (1983) stated:

The "consent" ordinance also represents an unwarranted application of police power. This Court stated in *Freeman v. Board of Adjustment* (1934), 97 Mont. 342, 356, 34 P.2d 534, "In order for [an] ordinance to

comply with the requirements essential to the exercise of police power . . . it [is] essential that there should be an appellate body such as the board of adjustment, with the power to consider exceptional cases. [. . .] We therefore find the “consent” ordinance in this case to be unconstitutional as an unlawful delegation of legislative authority and police power. The judgment of the district Court of reversed. (Emphasis added.)

CONCLUSIONS:

1. Pursuant to subsection 19.70.010 Missoula Municipal Code, the City Council has pursuant to zoning ordinance established the following requirements for the City Zoning Officer to review in order to determine eligibility to obtain a zoning compliance permit:

1. Is the proposed development consistent with the county zoning classification in effect at the time of annexation?
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2. Pursuant to subsection 19.70.010(l) Missoula Municipal Code, an applicant may appeal a zoning officer’s determination of ineligibility for a zoning compliance permit to the City council within five (5) working days of the Zoning Officer’s decision. Also, pursuant to section 76-2-326 MCA, any person aggrieved by an administrative zoning decision of an administrative Zoning Officer may appeal that decision to the Municipal Zoning Board of Adjustment. Two Montana Supreme Court decisions provide

that it is essential that there be an appellate body such as a Zoning Board of Adjustment for zoning regulations to be constitutional.

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/s/

Jim Nugent, City Attorney

JN: mdg