



OFFICE OF THE CITY ATTORNEY

435 RYMAN • MISSOULA, MT 59802-4297 • (406) 552-6020 • FAX: (406) 327-2105
EMAIL: attorney@ci.missoula.mt.us

Legal Opinion 2007-024

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Roger Millar, OPG Director; Mike Barton, OPG; Tim Worley, OPG; David Loomis, OPG; Jennie Dixon, OPG; Pat Kieley, OPG; Denise Alexander, OPG; Laval Means, OPG; Mary McCrea, OPG; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk;

FROM: Jim Nugent, City Attorney

DATE December 12, 2007

RE: Montana's municipal zoning protests that require two-thirds of City Council members present and voting to override protest.

FACTS:

Monday evening, December 10, 2007, opponents to the proposed Sonata Park proposed zoning and subdivision in the Rattlesnake Valley at the public hearing indicated that zoning opponents believed they had submitted sufficient nearby property owner protests to zoning pursuant to Montana state law to trigger a statutory requirement for a two-thirds favorable vote of those City council members present and voting in order to adopt the proposed zoning.

ISSUE:

What zoning protests are sufficient to cause City Council to be required to have a favorable vote of two-thirds of City Council members present and voting in order to override a zoning protest and adopt the zoning?

CONCLUSION:

Pursuant to subsection 76-2-305(2) MCA, a favorable vote of two-thirds of the present and voting members of the City Council is necessary to adopt zoning if a written protest to the zoning is submitted by the owners of 25% or more of either the area of the lots included in any proposed change, or 25% of those lots 150 feet from a lot included in a proposed change.

LEGAL DISCUSSION:

Montana's Municipal zoning laws are set forth in title 76, chapter 2, part 3, MCA entitled "Municipal Zoning." Section 76-2-305 MCA includes statutory provisions pertaining to zoning protests. Section 76-2-305 MCA provides:

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 (1) A regulation, restriction, and boundary may be amended, supplemented, changed, modified, or repealed.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 150 feet from a lot included in a proposed change.

(Emphasis added.)

This statutory protest provision expressly requires an extraordinary majority vote of the city council whenever there is a signed statutory protest by the real property owners of 25% or more of either (a) the area of the lands included in the proposed zoning change or (b) the owners of those lots 150 feet from a lot included in a proposed change.

Statutory municipal zoning protests that trigger an extraordinary super majority vote of the city council in order to enact a statutorily protested zoning proposal are common in the United States. They were a standard feature of what is commonly known and referred to as the original Standard Zoning Act.

McQuillan, Municipal Corporations, 3rd Edition Revised Volume 8A, § 25.248, pages 318-322 discusses statutory municipal zoning protests and property owner objections as follows:

§25.248. Protests and objections.

Provision generally is made for the making of protests or objections to zoning changes by affected property owners or a certain percentage of them. Such a provision has been described as a limitation on the general powers of the municipal legislative body, required to be strictly enforced. .

...

A common statutory provision, following that of the Standard Zoning Act, is that if an ordinance constitutes an attempt to amend, supplement, or change the regulations and districts established by a previous ordinance, a protest may be filed by specified property owners or a prescribed percentage of them, and in this event, a unanimous, or three-fourths, or other required vote of the city council is necessary for the passage of the ordinance. The purpose of such a provision is to confer a

measure of added protection against unwanted or ill-considered change upon those property owners who would be most affected by it. A provision of this character is not invalid as an unlawful delegation of legislative authority to property owners. Such a provision is applicable to citywide as well as to piecemeal changes of the general plan of zoning. . . . " (Emphasis added.)

Rathkopf's The Law of Zoning and Planning, Volume 3, §43.1, pages 43-2 and 43-3 explains in its overview that:

"Protest provisions permit qualified neighboring owners to formally protest the enactment of a proposed zoning enactment. Valid protest petitions generally require that an extraordinary majority of the legislative body approve the proposal."

Montana Attorney General Joe Mazurek held in 46 Op. Atty Gen. 5 (1995) that this statutory extraordinary vote requirement also applied to municipal interim zoning authority holding:

HELD: The protest provisions in Mont. Code Ann. § 76-2-305(2) are available to affected landowners whenever an existing zoning regulation is changed within the scope of Mont. Code Ann. § 76-2-305(1) through exercise by a city or town council of its interim zoning authority under Mont. Code Ann. § 76-2-306.

Pursuant to subsection 2-15-201(7) MCA pertaining to the duties of an attorney general "the attorney general's opinion is controlling unless overruled by a state district court or the Supreme Court." Thus, the statutory extraordinary majority vote of the city council requirement applies to statutorily protested interim zoning as well.

Protests may also be withdrawn in writing prior to final City Council action. Section 7-1-4132 MCA of Montana general Municipal statutes pertains generally to protests with respect to municipal government operations. Pursuant to subsection 7-1-4132(4) MCA, "a person may in writing withdraw a previously filed protest at any time prior to final action by the government body."

7-1-4132. Protest. (1) Whenever a protest is authorized, it is sufficient if it is in writing, signed, and contains the following:

- (a) a description of the action protested sufficient to identify the action against which the protest is lodged;
- (b) a statement of the protestor's qualifications to protest the action against which the protest is lodged, including ownership of property affected by the action; and
- (c) the address of the person protesting.

(2) Protests shall be submitted as provided by law and ordinance. The person receiving protests for a municipality shall note on each protest the

date it was received.

(3) A protest which contains the required information may be signed by more than one person. A protest signed by more than one person is a valid protest by each signer.

(4) A person may in writing withdraw a previously filed protest at any time prior to final action by the governing body.

(5) Signers are encouraged to print their names after their signatures. (Emphasis added.)

CONCLUSION:

Pursuant to subsection 76-2-503(2) MCA, a favorable vote of two-thirds of the present and voting members of the City Council is necessary to adopt zoning if a written protest to the zoning is submitted by the owners of 25% or more of either the area of the lots included in any proposed change, or 25% of those lots 150 feet from a lot included in a proposed change.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN: mdg
pc: Zoning File
City Council File