



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 2007-021

TO: Mayor John Engen; Ellen Buchanan; Donna Gaukler; Anne Guest; Doug Waters; Ellen Leahy; Roger Millar; Don Verrue; Tom Steenberg; Rusty Wickman; Steve King; All City Boards, Commissions, Authorities, and Committees

cc: City Council, Dept. City Clerk, Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE November 29, 2007

RE: A government board, commission, authority, or committee may not take action during their respective meetings on items arising out of public comment for which specific notice of the matter is not included on the entity's agenda for that meeting

FACTS:

The purpose of this legal opinion is to serve as a reminder to department heads and the boards, commissions, authorities, and committees your staff serves during their meetings that government agencies, boards, committees, commissions, and authorities may not take action on items arising out of public comment for which specific notice of the matter is not included on the entity's agenda for that meeting.

ISSUES:

1. What does Montana state law provide with respect to a government agency providing for public comment on non-agenda items within the government agency's jurisdiction?
2. What does Montana state law provide with respect to a government agency taking action on a non-agenda-identified matter arising out of public comment?

CONCLUSIONS:

1. Montana state law requires that every government board, commission, authority, committee, and entity include an agenda item on their agenda allowing public comment on any public matter within the agency's jurisdiction that is not specifically on the agenda of the meeting.

2. Montana state law provides that a government agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on the matter on the agenda.

LEGAL DISCUSSION:

Any municipal government entity such as boards, commissions, committees, authorities, etc. are subject to the right of the public to participate prior to final decisions being made.

Montana Constitution Article II, section 8 and 9 establish constitutional rights of participation and right to know. These 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.

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.

Montana's general "Public Participation in Governmental Operations" laws are set forth in title 2, chapter 3 MCA.

Section 2-3-101 MCA pertaining to state legislative intent as well as section 7-1-4143 MCA provide that the public must be provided a "reasonable opportunity" to participate prior to a final decision being made. Section 7-1-4142 and 7-1-4143 MCA are municipal government operation statutes that provide:

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.)

Also, Montana's general public participation laws broadly define government agency to include local government boards, bureaus, commissions, authorities, etc., subsection 2-3-102(1) MCA provides in pertinent part.

2-3-102. Definitions. As used in this part, the following definitions apply: (1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts . . . (Emphasis added.)

Section 2-3-103 MCA of Montana's general public participation in government operations law provides important guidelines with respect to public comment and the action limitations that exist with respect to public comment on non-agenda items during the same meeting at which the non-agenda public comment arises.

2-3-103. Public participation -- governor to ensure guidelines adopted. (1) (a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public. The agenda for a meeting, as defined in 2-3-202, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in 2-3-212.

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request. (Emphasis added.)

Pursuant to subsection 2-3-103(1) MCA, the agenda for a government agency meeting "must include an item allowing public comment on any public matter that is not

on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting.” (Emphasis added.) Thus, there must be an agenda item on the agenda providing for public comment on items not on the agenda but within the jurisdiction of the entity conducting the meeting.

However, also pursuant to subsection 2-3-103(1) MCA, the government entity “may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that mater.” (Emphasis added.)

Thus, for example, a government entity may not take action on an item arising during a public comment if the item or matter is not specifically identified on the meeting agenda as a matter to be discussed by the government entity.

Obviously, if the item or matter is not specifically identified on the meeting agenda, adequate notice of the item or matter does not exist for the purposes of either public information or public participation. It also is obviously unfair for one side of an issue to appear on a matter or item and have a municipal board, authority, commission, committee, etc. take action on the item or matter when there has been no public notice and/or public agenda identification of the specific item or matter, especially if it pertains or affects another person or entity and has no advance notice of opportunity to comment on the item or matter.

CONCLUSIONS:

1. Montana state law requires that every government board, commission, authority, committee, and entity include an agenda item on their agenda allowing public comment on any public matter within the agency’s jurisdiction that is not specifically on the agenda of the meeting.
2. Montana state law provides that a government agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on the matter on the agenda.

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/s/

Jim Nugent, City Attorney

JN: mdg