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Legal Opinion 2015-013

TO: City Council; Mayor John Engen; Mike Haynes; Gregg Wood; Wade Humphries; Don Verrue; Steve Meisner; Jason Diehl; Jeff Brandt; Chad Nicholson

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE April 17, 2015

RE: Permissible land uses within floodplain but outside of floodway

FACTS:

During the past two weeks city council public works committee there has been some staff presentation and discussion with city council members concerning potential revisions to the City of Missoula floodplain regulations, including building construction limitations or restrictions pertaining to structures permitted to be built within a floodplain.

ISSUE:

Does Montana state flood plain and floodway management law allow some permissible land uses and structures to be located within a designated floodplain?

CONCLUSION:

Yes, Montana state law section 76-5-402 MCA identifies permissible land uses that may be located within a floodplain; but outside of a floodway.

LEGAL DISCUSSION:

Title 76, chapter 5 MCA is entitled “FLOOD PLAIN AND FLOODWAY MANAGEMENT”. Section 76-5-103 MCA sets forth numerous statutory definitions for Montana’s flood plain and floodway management laws. Some of the important statutory definitions of interest and relevance to local government officials include; but are not limited to the following statutory definitions:

“(3) ‘Department’ means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

- (4) “Designated flood plain” means a flood plain whose limits have been designated pursuant to part 2 of this chapter.
- (5) ‘Designated floodway’ means a floodway whose limits have been designated pursuant to part 2 of this chapter.
- (6) ‘Drainway’ means any depression 2 feet or more below the surrounding land serving to give direction to a current of water less than 9 months of the year and having a bed and well defined banks.
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- (8) ‘Flood’ means the water of any watercourse or drainway that is above the bank or outside the channel and banks of the watercourse or drainway”.
- (9) ‘Flood of 100 year frequency’ means a flood magnitude expected to recur on the average of once every 100 years or a flood magnitude that has a 1% chance of occurring in any given year.
- (10) “Flood plain” means the area adjoining the watercourse or drainway that would be covered by the floodwater of a flood of 100 year frequency, except for sheetflood areas that receive less than 1 foot of water per occurrence and are considered ‘zone B’ or a ‘shaded X zone’ by the federal emergency management agency.
- (11) ‘Floodway’ means the channel of a watercourse or drainway and those portions of the flood plain adjoining the channel that are reasonably required to carry and discharge the floodwater of any watercourse or drainway.”

Title 76, chapter 5, part 4 MCA is entitled “USE OF FLOOD PLAINS AND FLOODWAYS”. Section 76-5-401 MCA is entitled “PERMISSIBLE OPEN-SPACE USES” and provides as follows:

76-5-401. Permissible open-space uses. The following open-space uses are permitted within the designated floodway to the extent that they are not prohibited by any other ordinance or statute and provided they do not require structures other than portable structures, fill, or permanent storage of materials or equipment:

- (1) agricultural uses;
- (2) industrial-commercial uses such as loading areas, parking areas, or emergency landing strips;
- (3) private and public recreational uses such as golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, boat launching ramps, swimming areas, parks, wildlife management and natural areas, alternative livestock ranches, fish hatcheries, shooting preserves, target ranges, trap and skeet ranges, hunting and fishing areas, or hiking and horseback riding trails;
- (4) forestry, including processing of forest products with portable equipment;
- (5) residential uses such as lawns, gardens, parking areas, and play areas;
- (6) excavations subject to the issuance of a permit under 76-5-405 and 76-5-406.

Section 76-5-402 MCA is entitled “PERMISSIBLE USES WITHIN FLOODPLAIN BUT OUTSIDE FLOODWAY and provides as follows:

76-5-402. Permissible uses within flood plain but outside floodway. Permits must be granted for the following uses within that portion of the flood plain not contained within the designated floodway to the extent that they are not prohibited by any other ordinance, regulation, or statute:

- (1) any use permitted in the designated floodway;
- (2) structures, including but not limited to residential, commercial, and industrial structures, provided that:
 - (a) the structures meet the minimum standards adopted by the department;
 - (b) residential structures are constructed so that the lowest floor elevation, including basements, is 2 feet above the 100-year flood elevation;
 - (c) commercial and industrial structures are either constructed as specified in subsection (2)(b) or are adequately floodproofed up to an elevation no lower than 2 feet above the 100-year flood elevation. The floodproofing must be in accordance with the minimum standards adopted by the department.

Section 76-5-403 MCA is entitled “PROHIBITED USES WITHIN FLOODWAY” and provides as follows:

76-5-403. Prohibited uses within floodway. The following nonconforming uses shall be prohibited within the designated floodway:

- (1) a building for living purposes or place of assembly or permanent use by human beings;
- (2) a structure or excavation that will cause water to be diverted from the established floodway, cause erosion, obstruct the natural flow of water, or reduce the carrying capacity of the floodway;
- (3) the construction or permanent storage of an object subject to flotation or movement during flood level periods.

There are of course many other statutory provisions in Montana’s flood plain and floodway management laws. The above cited laws seem to be provisions of law that are of significant interest to the city council’s current review and consideration.

CONCLUSION:

Yes, Montana state law section 76-5-402 MCA identifies permissible land uses that may be located within a floodplain; but outside of a floodway.

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/s/ _____
Jim Nugent, City Attorney

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