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## Legal Opinion 2016-006

**TO:** Mayor John Engen, City Council, Dale Bickell, Ginny Merriam, Mike Haynes, Laval Means, Leslie Schwab, Denise Alexander, Mary McCrea, Drew Larson, Jen Gress, Tom Zavitz, Ben Brewer, Marty Rehbein, Kirsten Hands, Ellen Buchanan, Chris Behan, Kelly Elam, Historic Preservation Commission, Department Attorney

**CC:**

**FROM:** Jim Nugent

**DATE** March 16, 2016

**RE:** Montana Constitutional Right to Know includes Constitutional Right of all Persons to Observe the Deliberations of all Public Bodies

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### FACTS:

The purpose of this Legal Opinion is to remind the public bodies, committees or subcommittees who potentially may be reviewing and considering an application for a demolition permit that they are public bodies that must always comply with Montana's public meeting laws.

### ISSUE(S):

What does Montana law require with respect to a person's ability to observe the deliberations of a public body, or a committee or subcommittee of a public body?

### CONCLUSION(S):

Montana state law establishes a Montana Constitutional right to know right for all persons to observe the deliberations of all public bodies, including committees and subcommittees of a public body.

### LEGAL DISCUSSION:

Article II, section 9 of Montana's 1972 Constitution states as follows:

**“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.” (emphasis added)**

The Montana State Legislature has also statutorily required that the deliberations of all public bodies shall be conducted openly. Title 2, chapter 3, part 2 Montana Code Annotated is entitled “OPEN MEETINGS”. Section 2-3-201 MCA states:

**2-3-201. LEGISLATIVE INTENT-LIBERAL CONSTRUCTION.** The legislature finds and declares that public boards, commissions, councils and other public agencies in this state exist to aid in the conduct of the people’s business. **IT IS THE INTENT OF THIS PART THAT ACTIONS AND DELIBERATIONS OF ALL PUBLIC AGENCIES SHALL BE CONDUCTED OPENLY.** The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed. (emphasis added)

Subsection 2-3-203(6) MCA explicitly provides that any committee or subcommittee of a public body must abide by Montana’s open meeting laws. Section 2-3-203 MCA provides in its entirety as follows:

**2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public – exceptions.** (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the Supreme court, must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) The Supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(6) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.

Pursuant to section 2-3-213 MCA any decision made by a public body in violation of section 2-3-203 MCA quoted above may be declared void by a district court.

LEGAL THESAURUS regular edition by William C. Burton at pages 145 and 146 indicates that synonyms for the term “deliberate” include, but are not limited to:

Analyze, analysis, considered, carefully considered, carefully weighed, discuss, discussion, reason, reasoned, take into consideration, thinking out, thought, thoughtfulness, etc., etc..

Black's Law Dictionary, Eighth Edition at page 500 defines the term “discussion” as including “The act of exchanging views on something; debate”. Also, Black's Law Dictionary, Eighth Edition, page 459 defines the term “deliberations” as including “the act of carefully considering issues and options before making a decision or taking some action.”

Clearly members of a public body, or its committee or subcommittee, when discussing items that they are going to consider in the future or currently have pending or under consideration, whether in person, by phone, email, etc., must timely comply with Montana's public right to know and public participation laws, which includes allowing all persons to timely observe their discussions, debates and/or deliberations.

Also, anything of any potential substance that a member of the public body inadvertently receives in whatever form outside of a public meeting or public record that might influence their decision making in any way should timely be entered into the public record; so that all persons in the public will have a reasonable opportunity to respond or comment on the item, whether it be in support, in opposition, to question, to critique, etc.. Reasonable opportunity for public participation must always be timely provided prior to any final recommendation or decision being made by a public body, or the public body's committee or subcommittee.

Pursuant to Montana public participation laws, discussions among members of a public body that is required to conduct or perform its actions pursuant to Montana's open meeting laws may be considered to be meeting when discussing items that are coming before or are pending before the public body.

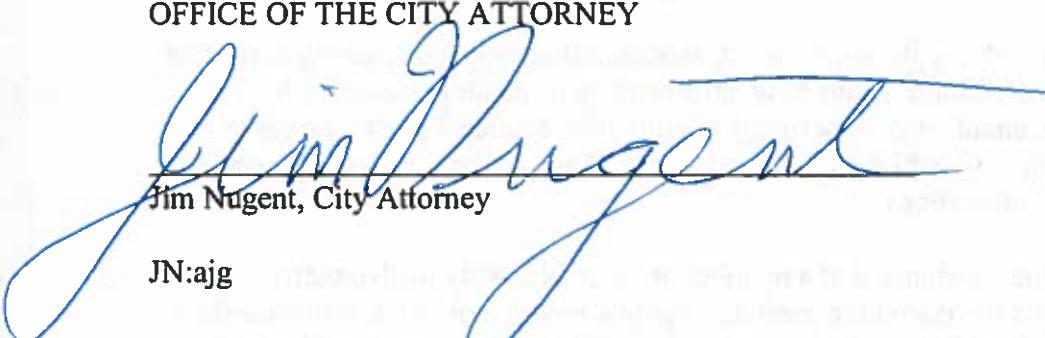
It must also be noted that the Montana Supreme Court has held that Montana's open meeting laws require public notice of a meeting and indicated in Supreme Court decisions (1) that a telephone meeting discussion between two of three county commissioners concerning approval of a preliminary plat had insufficient notice of the public meeting. See *Board of Trustees v. County Commissioners* 186 M 148, 606 P 2d 1069(1980), and (2) that without public notice a meeting is open to the public in theory only. See *Common Cause of Montana v. Statutory Commission to Nominate Candidates for Commissioner of Political Practices*, 263 Mont. 324, 868 P 2d 604(1994).

It is important and imperative that members of a public body, committee, or subcommittee realize that if a public body concludes an agenda item during a public meeting and moves on to other agenda items then later returns to an earlier agenda item to discuss the earlier agenda item without providing any reasonable advance public notice to the public or persons affected by the agenda item, that a second discussion would occur later in the meeting; there is no public notice and no legal public meeting; because at that point in time the purported public meeting is an open meeting in theory only. It is also important imperative that, pursuant to the "Appearance of Fairness" legal doctrine, the members of any public body, committee or subcommittee must remain unbiased, objective, fair and reasonable in their actions and conduct prior to making their final decision concerning the application.

**CONCLUSION(S):**

Montana state law establishes a Montana Constitutional right to know right for all persons to observe the deliberations of all public bodies, including committees and subcommittees of a public body

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