

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2016-011

TO: Mike Haynes, Leslie Schwab, Laval Means, City Council, Mayor's Office, Historic Preservation Commission, City Clerk Department, Missoula Redevelopment Agency Department

CC: Attorney Department

FROM: Jim Nugent, City Attorney

DATE April 20, 2016

RE: Appearance of Fairness legal doctrine application to conduct and communications of members of public body with respect to permit application decisions pertaining to private property land use rights

FACTS:

Currently the owner of the Merc building(s) in downtown Missoula, located at the corner of Higgins and Front Street, has submitted an application for a demolition permit for the Merc building that is pending before the City of Missoula Historic Preservation Commission. The building is identified as a historic resource for purposes of the City of Missoula historic preservation ordinances set forth in Missoula Municipal Code. The demolition permit applicant's attorney as well as other persons have expressed multiple concerns that some members of the historic preservation commission have engaged in conduct and/or communications that are available in public settings that provides an appearance of lack of neutrality, bias, partiality, unfairness and lack of objectivity with respect to their public review and public decision making for applicant's pending application for a demolition permit.

In one instance a City of Missoula Historic Preservation Commission member came to a Missoula City Council committee meeting and, during public comment, identified himself as a "citizen advocate" on behalf of saving the Merc building and spoke against demolition of the Merc building. At the conclusion of the city council committee meeting a news reporter as well as the attorney for the applicant for the demolition permit for the Merc building immediately expressed their concern that the historic preservation commission member who had spoken at the city council committee meeting as a "citizen advocate" was not neutral, impartial, unbiased, fair, or objective. Upon learning of the multiple concerns that had been expressed about his "citizen advocate" comments at a public city council committee meeting, the Historic Preservation Commission member indicated that he would recuse himself from voting on the determination of the demolition permit application.

However, since then, city officials have received multiple expressions of concern that some additional members of the City of Missoula Historic Preservation Commission have engaged in conduct and communications that reasonably provide an appearance of lack of neutrality, bias, partiality, unfairness and lack of objectivity to be decision makers with respect to the application for a demolition permit for the Merc building. Some examples for which concern was expressed were that at least two of the historic preservation commission members had signed a petition to save the Merc building, noted their conduct on their Facebook page and invited other members of the public to also sign the Save the Merc Petition. After the application for demolition was submitted to the HPC, a group of citizens formed a “Save the Merc” Facebook page in which they post miscellaneous articles on saving the Merc, calls to action to save the Merc and on how people can donate money to the Save the Merc campaign. Some members of the HPC have publicly “liked” and shared numerous “Save the Merc” Facebook postings and various calls to action posted to the Save the Merc Facebook page. In addition, concern was expressed that one historic preservation commission member was actively working through his architectural firm with citizen Ian Lange to design an undertaking proposal as an alternative to demolition of the Merc building that would conflict with the demolition permit application.

ISSUE(S):

(1) If a member of a public body historic preservation commission with a duty and responsibility to publicly review and approve or deny an application for a demolition permit for the Merc building signs a petition to save the Merc building or engages in conduct that complaining citizens express concern provides an appearance of lack of neutrality, partiality, bias, unfairness or lack of objectivity has the historic preservation commission member created an appearance of lack of neutrality, bias, partiality, unfairness and lack of objectivity?

(2) If a member of a public body historic preservation commission that has a duty and responsibility to publicly review and approve or deny an application for a demolition permit for the Merc building actively works with a citizen to design a proposed land use undertaking for residential condos, retail or office uses within the Merc building as an alternative to demolishing the Merc building, has that person engaged in conduct that provides an appearance of lack of neutrality, partiality, bias, unfairness or lack of objectivity with respect to their role as a historic preservation officer?

CONCLUSION(S):

(1) Yes, a historic preservation commission member who signs a petition to save the Merc building, when the historic preservation commission must publicly review and either approve or deny an application for a demolition permit for the Merc building, engages in conduct that provides an appearance of lack of neutrality, partiality, bias, unfairness or lack of objectivity with respect to their decision making role with respect to the demolition permit application.

(2) Yes, a historic preservation commission member who is actively working on designing a use for the existing Merc building as an alternative to approving the demolition permit application

for the Merc building is engaged in conduct that produces an appearance of lack of neutrality, partiality, bias, unfairness or lack of objectivity with respect to approval of the demolition permit application.

LEGAL DISCUSSION:

In order for public bodies making specific application for permit decisions to have public credibility and for the public to have confidence in the public body, government land use public bodies making decisions on applications involving private property rights with respect to land use applications are expected to abide by the “Appearance of Fairness” legal doctrine when approving or denying applications pertaining to specific land use private property rights. Constitutional due process requires that a person be afforded a fair hearing with respect to government actions determining their specific private property rights as part of a permit application public hearing review process.

The persons appointed to the City of Missoula Historic Preservation Commission are public officers or public officials with respect to their duties and responsibilities as historic preservation commission members. City of Missoula officials and staff have received multiple expressions of concern that several members of the city historic preservation commission have engaged in communications or conduct that provides an appearance of bias, lack of neutrality, partiality, unfairness, lack of objectivity.

Subsection 2-2-105(5) MCA entitled “ETHICAL REQUIREMENTS FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES” provides that a public officer “may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking”.

Subsection 2-2-121(2)(e) MCA entitled “RULES OF CONDUCT FOR PUBLIC OFFICERS AND PUBLIC EMPLOYEES” provides that a public officer may not “(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which an officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative or agent

Black’s Law Dictionary, Eighth Edition page 767 defines the term “impartial” as “Unbiased, disinterested”.

Black’s Law dictionary, Eighth Edition page 1067 defines the term “neutral” in pertinent part as “a person taking no side in a dispute”.

Also, Black’s Law dictionary at page 171, defines the term “bias” generally in pertinent part as meaning “inclination, prejudice, predilection”. Further, “bias” can be “actual bias” or “implied bias”.

Black's Law Dictionary Eighth Edition, page 319 defines "conflict of interest" in pertinent part as "incompatibility" between one's private interests and one's public interests or "incompatibility between the interests of two".

LEGAL THESAURUS, Regular Edition by William C. Burton provides the following as some of the synonyms for words (1) "bias", (2) "impartial" and (3) "unbiased":

- (1) "bias" "favoritism, partiality, predetermination, predilection, prejudice";
- (2) "impartial" dispassionate, equitable, fair, fair minded, free from bias, lacking prejudice, neutral, not biased, unbiased";
- (3) "unbiased" disinterested, dispassionate, fair, fair minded, impartial, neutral, objective, uninfluenced, unprejudiced".

The above identified legal authorities and sources are standards, criteria and guidelines that provide helpful assistance in reviewing whether a person's factual circumstance conduct provides an appearance of lack of neutrality, bias, partiality, unfairness and lack of objectivity.

Pursuant to the application of these legal standards, criteria and guidelines any historic preservation commission member who signs a petition to save a building for which there is an application for a demolition permit pending before the historic preservation commission has provided an appearance of lack of neutrality, bias, partiality, unfairness and lack of objectivity. Likewise, historic preservation commission members who liked and shared numerous Save the Merc Facebook postings or urge others to sign the petition to save the Merc are generating an appearance of bias, lack of neutrality, partiality, unfairness and lack of objectivity.

The attorney for the applicant for a demolition permit for the Merc building, when expressing multiple concerns of conduct by some members of the historic preservation commission that provides an appearance of lack of neutrality, bias, partiality, lack of fairness or objectivity provided an email to city officials from citizen Ian Lange that in part states the following excerpts:

"Steve Adler, of the Adler and Associates architectural firm, a small group of other interested folks and I have been meeting regarding the possibility of maintaining the original character of this building but 'repurposing it'"

"Steve has been working on floor plans and, contrary to what some folks have heard or read in the Missoulian, other than some seismic stability work, the building is structurally sound."

"You may have read that, presently, Home-base, out of Bozeman, is awaiting a permit to demolish the building and replace it with a 5 story Marriott hotel. As Clinton Lawson wrote in the Missoulian on March 31, 'are we, as a community, truly honoring the tradition and spirit of the Merc by building the world's 4,425th Marriott on it?'"

"What Steve and I have in mind are condos of various sizes on the second floor with a business...."

“A June 7 decision deadline is now in place because the city must either issue or not issue a demolition permit. The proposed model for this building will have an elevator and covered parking. Condo spaces for sale will be unfinished, but insulated, have four sheet-rocked and painted exterior floor plan walls with electoral (sic) outlets...”

“If you know of folks who might be interested in this project (either as business owners, condo buyers, or interested only in helping save the Merc), please ask them to e-mail me for more details including floor plans, or feel free to send me their contact information-if you wish. We are presenting working on sale prices and estimated condo finishing prices.”

Pursuant to the application of these legal standards, criteria and guidelines any historic preservation commission member who is actively working through his architectural firm to design a proposed residential condo, retail and/or office use of the existing building is actively proposing an alternative undertaking that is inconsistent with and in conflict with the proposed demolition permit application.

CONCLUSION(S):

- (1) Yes, a historic preservation commission member who signs a petition to save the Merc building, when the historic preservation commission must publicly review and either approve or deny an application for a demolition permit for the Merc building, engages in conduct that provides an appearance of lack of neutrality, partiality, bias, unfairness or lack of objectivity with respect to their decision making role with respect to the demolition permit application.
- (2) Yes, a historic preservation commission member who is actively working on designing a use for the existing Merc building as an alternative to approving the demolition permit application for the Merc building is engaged in conduct that produces an appearance of lack of neutrality, partiality, bias, unfairness or lack of objectivity with respect to approval of the demolition permit application.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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