

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2018-028

**TO:** City Council, John Engen, Dale Bickell, Mike Haynes, Mary McCrea, Andrew Boughan, Denise Alexander, Jenny Baker, Don Verrue, Ginny Merriam, Leigh Griffing, Steve Johnson, Marty Rehbein, Kirsten Hands, Kelly Elam, Donna Gaukler, Mike Brady, Scott Hoffman, Jeff Brandt, Gordy Hughes, Ellen Buchanan, Kevin Slovarp, Troy Monroe, Tiffany Brander, Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** November 30, 2018

**RE:** City Council meetings, deliberations and communications pertaining to proposed land use actions pending before the City Council must occur in city public meetings in which deliberations must be publicly observable and all communications city public record communications.

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### **FACTS:**

The Missoula City Council currently has pending before it proposed land use actions pertaining to zoning and annexation that include DeSmet School and lands owned by DeSmet School. The DeSmet School board desires to meet with some city council members pertaining to the proposed zoning and annexation of DeSmet School owned lands as well as nearby other lands owned by others. The Missoula City Council review is set for public hearing in December 2018 and City Council action is scheduled to occur during December 2018.

### **ISSUE:**

At this point in time with respect to the pending proposed land use zoning and annexation proposals must any city council members meeting about the proposed zoning and annexation land use actions be at city public meetings with city public records kept and made available for public review and inspection?

### **CONCLUSION:**

Yes, any and all property owners as well as members of the public generally do possess Montana Constitutional rights to have notice, know about, and opportunity to observe and participate in any city council member meetings pertaining to pending land use zoning and annexation proposals.

## **LEGAL DISCUSSION:**

The Missoula City Council currently has pending before it specific land use zoning and annexation proposals that are scheduled for public hearing in December 2018 that involve DeSmet School as well as currently undeveloped lands owned by DeSmet School. At this point in time, each and every affected property owner as well as the public in general possess Montana Constitutional and statutory rights to know, participate and observe city council member meetings, discussions and deliberations pertaining to the pending land use zoning and annexation actions that are being proposed.

The Missoula City Council has already this month taken action to adopt an ordinance amendment to title 20 Missoula Municipal zoning code to establish an A-Aviation Zoning District and /NC-MDP Missoula Development Park Neighborhood Character Zoning Overlay District that is relevant to the land use zoning and annexation proposals currently pending before the Missoula City council.

Montana's Constitution mandates Montana Constitutional rights to the public that allow the public to participate in the operation of public bodies (such as city council), to know what the public body (city council) is considering and discussing as well as a public right to observe deliberations of public bodies. See Article II, sections 8 RIGHT OF PARTICIPATION and 9 RIGHT TO KNOW. These Montana Constitutional public rights for the public are also set forth in Montana state laws and may not be avoided by only having some members of the entire decision making public body participate in meetings or communications that should be city public meetings and city public records. See title 2, chapter 3 MCA entitled "PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS".

Further, the "appearance of fairness" legal principle with respect to public governing body decisions or actions that might be recommended, discussed and/or adopted by the governing body with respect to property owner property rights or potentially denying or authorizing/permitted specific land uses must be recognized. Potentially affected property owners, as affected property owners, must be ensured that they are not deprived of their due process right to an impartial, unbiased, neutral, fair, objective, reasonable public review and decision making process that the property owners have notice about as well as a reasonable opportunity to participate, know about proposals and communications as well as observe land use actions being considered or adopted with respect to the property that they own.

Montana Constitution Article II, sections 8 and 9 state:

"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." (emphasis added)

“Section 9. RIGHT TO KNOW. NO PERSON SHALL BE DEPRIVED OF THE RIGHT TO EXAMINE DOCUMENTS OR TO OBSERVE 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)

Montana state laws that more specifically establish the above quoted Montana Constitutional mandates include title 2, chapter 3 “PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS” as well as sections 7-1-4141 MCA “PUBLIC MEETING REQUIRED”; 7-1-4142 MCA “PUBLIC PARTICIPATION” and 7-1-4143 MCA “PARTICIPATION” that are set forth in Montana’s state municipal government laws.

In addition to the applicable provisions of title 2, chapter 3 “PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS”; Montana’s municipal state laws provide in sections 7-1-4141, 7-1-4142 and 7-1-4143 MCA as follows:

“7-1-4141. PUBLIC MEETING REQUIRED. (1) ALL MEETINGS OF MUNICIPAL GOVERNING BODIES, boards, authorities, committees, or other entities created by a municipality SHALL BE OPEN TO THE PUBLIC except as provided in 2-3-203. (2) APPROPRIATE MINUTES SHALL BE KEPT OF ALL PUBLIC MEETINGS AND SHALL BE MADE AVAILABLE TO THE PUBLIC FOR INSPECTION AND COPYING.”  
(emphasis added)

“7-4142. 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.

The governing body of a municipality is the legislative body of the municipality. See subsection 7-1-4121(6) MCA. It should also be noted that a city council committee motion/recommendation to the city council as governing body, is the city council committee’s final decision. Reasonable

opportunity for public participation must occur in the city council committee prior to the city council committee making its decision to make a recommendation or approve a motion.

**CONCLUSION:**

Yes, any and all property owners as well as members of the public generally do possess Montana Constitutional rights to have notice, know about, and opportunity to observe and participate in any city council member meeting pertaining to pending land use zoning and annexation proposals.

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/s/ Jim Nugent

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Jim Nugent, City Attorney  
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