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Legal Opinion 2018-029

TO: City Council, Mayor John Engen, Dale Bickel, Leigh Griffing, Mike Haynes, Ginny Merriam, Steve Johnson, Denise Alexander, Mary McCrea, Jenny Baker, Ben Brewer, Andrew Boughan, Laval Means, Tom Zavitz, Jen Gress, Kevin Slovarp, Troy Monroe, Marty Rehbein, Kirsten Hands, Kelly Elam, Ellen Buchanan, Chris Behan, Donna Gaukler, Tiffany Brander

CC: Legal Staff

FROM: Jim Nugent

DATE: December 6, 2018

RE: Necessity that with respect to land use property rights determinations being made by city council as governing body, city council members remain open minded, neutral, impartial, unbiased and objective so that public review process and procedure has "appearance of fairness" and retains credibility.

FACTS:

Concern has been expressed that during the city council meeting Monday evening December 3, 2018 a city council member spoke opposing a proposed annexation and zoning proposal for which the city council public hearing has not yet been held. Such partiality and lack of neutrality prior to the city council public hearing is a significant legal concern. Affected property owners as well as the general public cannot reasonably perceive the city council member to be open minded, neutral, impartial, unbiased or objective prior to the public hearing that is an important part of the public review process as well as important for due process with respect to a fair hearing occurring.

ISSUE(S):

Pursuant to the "appearance of fairness" legal doctrine, is it legally important with respect to the governing body, land use decisions affecting property owner property rights that the city council members remain open minded neutral, impartial, unbiased and objective during the public review process and procedure until city council discussion and debate occurs after the public hearing part of the public review?

CONCLUSION(S):

Yes, it is legally important that city council decision makers be open minded neutral, impartial, unbiased and objective throughout the public review process until city council deliberations occur in order to avoid violating the "appearance of fairness" legal doctrine as well as to avoid providing any affected property owners or members of the general public with a basis or grounds for successfully legally challenging and invalidating the city council decision based on a lack of neutrality, lack of impartiality, potentially biased and nonobjective pubic review process.

LEGAL DISCUSSION:

It is imperative for the credibility and fairness of any public body land use public review that potentially generally affects land use property owner property rights that the public process decision makers are open minded, neutral, impartial, unbiased and objective throughout the public review until deliberations, debate and final decision occurs. Adherence to an "appearance of fairness" legal doctrine consisting of an open minded, neutral, impartial, unbiased and objective procedural due process standard should be provided by city elected officials for specific land owner land use property right decisions. Such objective standards are undermined by any city elected official actions or conduct indicating pre-decision-making partiality, bias or prejudice. Evidence of pre-decision-making partiality, bias or prejudice by a City Council member/Mayor could disqualify the city elected official and/or invalidate the land use decision made by the City Council and/or Mayor if the member who failed to be neutral, impartial, unbiased and objective participates in the final decision making vote.

In order to avoid potential disqualification of a city elected official or, invalidation of a City Council decision pertaining to a specific land use property rights decision, as well as to protect constitutional due process for affected or interested parties, and avoid even the appearance of partiality, bias or prejudgment of the land use issues, elected City decision makers should not be making public comments expressing their partiality in advance of the public hearing occurring as part of the public review. It is important for land use decision makers to avoid weakening public confidence or undermining a sense of security of individual property owner rights as well as to provide a neutral, impartial, unbiased, fair public process with respect to land use decision making affecting property rights.

Montana's Constitution and state laws require reasonable opportunity for public citizen participation prior to a final decision being made. See Article II, section 8 Montana Constitution and title 2 chapter 3 MCA as well as sections 7-1-4141 through 7-1-4143 MCA.

A reasonable opportunity for citizen participation is not provided affected property owners or the general public if a decision maker publicly declares at a public meeting their decision prior to a public hearing even being held.

Rathkopf's "The Law of Zoning and Planning" Ziegler, Volume 2, §32.17, pages 32-54 through 32-58 pertaining to the appearance of fairness legal doctrine states:

"**§32:17 Appearance of fairness doctrines**

Court decisions in a number of states have developed "appearance of fairness" doctrines that attempt to restrict and prohibit conflicts of interest and bias that may undermine public confidence in the integrity of the zoning decisionmaking process. These doctrines may be based on the state public policy, the spirit of statutory restrictions, the right to a statutorily required fair hearing or simply judicial interpretation of the special due process standards governing adjudicatory action. While these doctrines generally are not strictly applied to purely legislative action, they may well be applied in conflict situations to members of local legislative bodies when acting in a quasi-judicial or administrative capacity and when the action of the public official involved is not expressly prohibited by statute.

Early Connecticut court decisions established conflicts of interests principles governing disqualification of members of zoning bodies. Courts in that state have reaffirmed the principal "that public policy requires that members of such public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty. The evil against which the policy is directed "lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power." It is "the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest.

In the New York case, Tuxedo Conservation and Taxpayers Ass'n v. Town Board, a "lame duck" town board amended local procedures under the state Environmental Quality Review Act in order to accelerate the environmental impact statement process and thereafter approved a special permit for a 200 million dollar, 3,900 unit "planned integrated development." All the while, it was known that one of the board members was an executive in the advertising agency which served the applicant developer and which stood to get the advertising account for the project. The board member in question cast the deciding vote.

Although the letter of the law did not apply (N.Y. Gen. Mun. Law §809 being limited to one who is an owner, employee or contingent contract holder with the applicant) the court overturned the approval, stating that while the anathema of the letter of the law may not apply to his action, the spirit of the law was definitely violated." The court indicated that not only

must actual conflict be avoided, but also the possible appearance of conflict. … For like Caesar's wife, a public official must be above suspicion."

In the New Jersey case Aldom v. Borough of Roseland, borough council proceedings concerning a rezoning were voided because one member had worked for 23 years for the company requesting the zoning change. . . .

Washington courts in a series of decisions have developed a rather strict "appearance of fairness" doctrine governing conflicts of interest and bias in zoning proceedings. As noted in a recent Washington court decision, the doctrine is aimed at preventing the appearance of unfairness as well as the actual existence thereof:

. . .

The Supreme Court of Washington has noted that under this appearance of fairness doctrine, "public officers impressed with the duty of conducting a fair and impartial fact-finding hearing upon results significantly affecting individual property rights as well as community interests, must so far as practicable, consideration being given to the fact that they are not judicial officers, be open minded, objective, impartial and free of entangling influences or the taint thereof. . . . They must be capable of hearing the weak voices as well as the strong. To permit otherwise would impair the requisite public confidence in the integrity of the planning commission and its hearing procedures." The doctrine is applied by Washington courts to any administrative or quasi-judicial zoning proceeding (including site-specific rezoning) where a public hearing is required by statute. (Emphasis added.)

. . .

Rathkopf's "The Law of Zoning and Planning" Ziegler, Volume 2, §32.18, page 32-60 provides in pertinent part:

§32:18 Disqualifying prejudgment bias

Appearance of fairness doctrines and the special due process standards governing adjudicatory zoning action often are held to require an unbiased decisionmaker. Impartiality in the form of prejudgment bias undermines the basic due process right to a fair hearing. In adjudicatory and quasi-judicial proceedings, a zoning decisionmaker, whether elected or appointed, functions in a role analogous to that of a judge who is required to fairly hear and weigh the evidence received and to objectively apply established standards for decision to the facts of the case."

The Rathkopf text goes on to indicate that courts focus their concern on factual circumstances involving evidence of actual prejudgment of the specific facts presented by the specific land use application. Rathkopf indicates at page 32-62 that a court's attention will focus "on the ultimate due process, standard, of whether zoning applicant has been denied a 'fair hearing' due to the 'prejudgment bias' of a decisionmaker who has closed his mind to fairly weighing the evidence."

Footnote 11 on page 32-63 identifies the following court cases from other states where a court had held that the "closed mind" of a zoning decisionmaker was evident during the course of the land use proceedings:

> Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480A.2d 114 (1984), wherein the court invalidated a zoning board's decision to waive subdivision regulations and grant subdivision approval where one of the board members who voted for approval had spoken in favor of the proposal at a public hearing before he became a board member. The court ruled that the board member had prejudiced the issue and should have disqualified himself. When a board member improperly fails to disqualify himself, the act of the board must be invalidated, because it is impossible to gauge the effect that member may have had on his colleagues.
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> Hornbury Tp. Bd. Of Sup'rs. v. W.D.D., Inc., 119 Pa. Commw. 74, 546 A.2d 1328 (1985) wherein the court held that the refusal of town supervisor to abstain from voting on approval of developer's application for variances when supervisor appeared before zoning hearing board with counsel to oppose variances was improper because of supervisor's bias.
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> McVay v. Zoning Hearing Bd. Of New Bethlehem Borough, 91 Pa. Commw. 287, 496 A.2d 1328 (1985), wherein the court held that the developer was denied due process when majority of members of zoning board who were appointed to consider conditional use permit for low income planned residential development had signed a petition opposing the original rezoning for the development.Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N.W.2d 842 (1993) (chairperson's comments created an impermissibly high risk of bias). (Emphasis added.) Also, see Keen v. Dane County Bd. of Supervisors, 269 Wis. 2d 488, 2004 WI App 26, 676 N.W.2d 154 (CT App 2003) (holding that letter of support for application created impermissibly high risk of bias (emphasis added).
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> Rathkopf "The Law of Zoning and Planning" Ziegler goes on to state in Section 32.19, page 32-66 and 32-67:

§32:19 Prejudice or partiality – Generally

"State court "appearance of fairness" doctrines and the special due process standards governing adjudicatory zoning action have been held to require disqualification of a decisionmaker where prejudice or partiality in regard to a zoning application is found to exist. Disqualifying prejudice or partiality has been found to exist on the basis of family or employment relationships or other associational ties. Also, prejudice has been found where a person who possesses the power of appointment over members of a zoning board appears before that board on behalf of or in opposition to an applicant. …

Where disqualifying prejudice or partiality is alleged, courts in many cases have noted that the relationship in question need not be shown to have actually tainted or influenced the decision. In a number of cases courts have stated that the test is whether a decisionmaker's personal interest stemming from the relationship might reasonably conflict with his official duty to decide impartially and thus weaken public confidence in the proper exercise of the zoning power." (Emphasis added.)

Rathkopf's "The Law of Zoning and Planning" Ziegler addresses remedies and sanctions §32.28, pages 32-88 and 32-89 in part as follows:

§32:28 Remedies and sanctions

"If a conflict or fairness violation is proved by opponents on appeal; the usual judicial remedy will be invalidation of the challenged zoning decision and remand for reconsideration, sometimes with procedures or terms of participation specified which will insure fairness, e.g., prohibiting the participation of conflicted members. In some cases, the prejudicial and determinative effect of a conflict of interest will be clear: as where, for example, a conflicted board member casts the deciding vote in granting or denying an approval. On the other hand, the taint is less clear where the conflicted member's vote was not necessary to the board's approval or denial, or where the approval involved is only preliminary or advisory. Yet further subtle questions as to the presence or absence of tainting effect can arise where the conflicted member has, for example, participated in a debate but refrained from voting.

Some state courts take the approach that participation in deliberation and/or voting by a member who should have been disqualified vitiates the entire proceeding, even though votes of other members would have sustained the result. This approach is usually premised on the theory that one member's self-interest may effect or influence the votes of other board members. Other courts have upheld board action, regardless of a tainted member's participation, so long as

there was the required number of votes without counting the vote of the disqualified member. (Emphasis added.)

There are no Montana Supreme Court decisions directly on point. The Montana Supreme Court in Madison River R.V. LTD v. Town of Ennis, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098, 2000 Mont. LEXIS 13 in part had before it a legal challenge that a town council member had a closed mind with respect to the land use proposal pending before the Ennis Town Council. The Montana Supreme Court stated in paragraphs 15-18 of its decision:

> To prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker had an "irrevocably closed" mind on the subject under investigation or adjudication. See **Federal Trade Commission v. Cement Institute** (1948), 333 U.S. 683, 701, 92 L. Ed. 1010, 1034, 68 S. Ct. 793, 803. In **FTC**, the Court upheld a ruling that members of the Federal Trade Commission, who entertained views as a result of their prior ex parte investigations that a cement pricing system was the equivalent of price fixing in violation of the Sherman Act, were not thereby disqualified from presiding in an unfair trade proceeding concerning the cement pricing system.
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> Here, the District Court thoroughly reviewed the transcript of the hearings before the Planning Board and determined that nothing Kensinger said indicated that his mind was irrevocably closed on the subject of the proposed subdivision. The court noted that at the first Planning Board meeting, Kensinger stated he had "uncertainties" about the project. He "questioned" whether the Town sewer system could support the proposed 73-vehicle recreational vehicle park, whether the developer would pay for problems he guaranteed would never occur, and whether the subdivision could ultimately result in a higher tax burden for the people of Ennis. The District Court stated, "While Commissioner Kensinger did express doubts about the subdivision's effects on Ennis, these expressions of uncertainty are evidence that his mind was anything but irrevocably made up on the subject."
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> R.V. also claims that Kensinger may have had a financial interest in the denial of its application. It has attached to its brief a copy of a letter from a Bozeman, Montana, attorney addressed to its own attorney. The letter stated that the Bozeman attorney had been retained by "a group of individuals who are interested in making an offer to purchase the river property," and inquired as to R.V.'s interest in such an offer. A handwritten note at the bottom indicated that a copy of the letter had been sent to Kensinger. However, the writer of the handwritten note is not identified and nothing in the letter or the handwritten note states or implies that Kensinger is a member of the group interested in purchasing the property. Thus, R.V. has not supported its contention that Kensinger had a financial interest in the denial of its application.
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> We agree with the District Court that Kensinger's statements do not indicate that he had an irrevocably closed mind on the subject of the park application. R.V. has not established in any other way that Kensinger had an irrevocably closed mind

> on the subject. We affirm the District Court's determination that the Town Council was not required to disqualify Kensinger from voting and the court's decision not to vacate the Town Council's decision because of its failure to disqualify Kensinger. (Emphasis added.)

There was no evidence in the public record that the town council member had previously taken a position either for or against, thereby indicating an irrevocably closed mind. Therefore, in the specific factual circumstances that existed in Madison River R.V. LTD v. Town of Ennis, Plaintiff did not adequately establish that the town council member had an irrevocably closed mind. Therefore, the courts would not disqualify the town council member from voting, nor would the courts invalidate the town council's decision.

CONCLUSION(S):

Yes, it is legally important that city council decision makers be open minded neutral, impartial, unbiased and objective throughout the public review process until city council deliberations occur in order to avoid violating the "appearance of fairness" legal doctrine as well as to avoid providing any affected property owners or members of the general public with a basis or grounds for successfully legally challenging and invalidating the city council decision based on a lack of neutrality, lack of impartiality, potentially biased and nonobjective pubic review process.

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/s/

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