

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2018-032

TO: City Council, Mayor John Engen, Mike Haynes, Dale Bickell, Leigh Griffing, Mary McCrea, Denise Alexander, John Wilson, Kevin Slovarp, Troy Monroe, Eric Andersen, Marty Rehbein, Kirsten Hands, Kelly Elam, Department Attorney

FROM: Jim Nugent, City Attorney

DATE December 14, 2018

RE: Potential inverse condemnation/ eminent domain liability exposure if City Council requires a private property owner in a private subdivision exemption project to provide land for a public way to provide ingress and egress to an adjacent property and/or if City Council significantly increases motor vehicle traffic from outside the subdivision exemption project utilizing a private road(s) within the subdivision exemption project for public traffic going to and from an adjacent property.

FACTS:

Hillview Crossing Missoula, LLC is proposing a 68 townhome exemption development (TED) dwelling unit residential development in Missoula's south hills utilizing the townhome/townhouse subdivision exemption set forth in Montana Subdivision and Platting Act, section 76-3-203 MCA identifying and authorizing subdivision exemption status for condominiums, townhomes or townhouses. The residential dwelling unit project is not a subdivision proposed project.

During recent years pursuant to Cause No. DV-16-167 Montana Fourth Judicial District Court, Missoula County, the District XI Human Resource Council, Inc has been unsuccessfully suing Hillview Crossing –Missoula, LLC, City of Missoula and Mike Haynes primarily in an effort to require Hillview Crossing-Missoula to provide a road across their private property to adjacent XI Human Resource Council, Inc. property in order to facilitate public ingress and egress to and from the adjacent Human Resource council property. Basically the lawsuit involved claims by Plaintiff District XI Human Resource Council, Inc. that a 2006 City Council subdivision preliminary conditional approval of a subdivision application that proposed a connecting public roadway to the adjacent Human Resource Council property thereby created a right for Human Resource Council to a public road across adjacent private property. The subdivision approved preliminary plat approval was never implemented and the preliminary plat approval time period has expired. Human Resource Council also was attempting to assert claims against the City of Missoula and Mike Haynes based on the City's issuance of a Zoning Compliance Permit on October 16, 2015 to Defendant Hillview Crossing-Missoula, LLC for a residential dwelling unit

development project that did not provide a roadway across the privately owned Hillview Crossing-Missoula, LLC land to connect to adjacent Human Resource Council land.

Some of the District XI Human Resource Council lawsuit claims were dismissed by the District Court on May 3, 2016. District XI Human Resource council's remaining lawsuit claims against Hillview Crossing-Missoula, LLC, the City of Missoula and Mike Haynes were dismissed by the District Court pursuant to summary judgment in favor of lawsuit Defendants on January 30, 2017.

Wednesday December 12, 2018 representatives of Human Resource Council LLC appeared at the Missoula City Council land use and planning committee requesting with respect to a pending Hillview Crossing Townhome Exemption Development (TED) zoning Conditional Use request that the Missoula City Council require Hillview Crossing-Missoula, LLC to negotiate with Human Resource Council to provide land for a road connection across Hillview Crossing –Missoula's private land from the proposed Hillview Crossing-Missoula, LLC townhome subdivision exemption project land area to the adjacent Human Resource council property. The roadways within the Hillview Crossing-Missoula, LLC will be private roads located on privately owned land.

ISSUE:

If the Missoula City Council attempts to require a connecting road across private property to facilitate ingress and egress travel to an adjacent Human Resource Council property, could there be potential inverse condemnation/ eminent domain monetary liability exposure for the City of Missoula either taking private land for a public use and/or potentially negatively impacting the proposed Hillview Crossing Townhome Exemption (TED) Development zoning conditional use project if a City Council required connecting road across private property that also potentially significantly increases the volume of motor vehicle traffic passing through the Hillview Crossing-Missoula project on private roadways?

CONCLUSION:

Article II, section 29 of the Montana Constitution provides that private property shall not be taken or damaged for public use without just compensation to the full extent of the loss. Also, see the statutory provisions of title 70, chapter 30 MCA "EMINENT DOMAIN" to the same effect.

LEGAL DISCUSSION:

Wednesday December 12, 2018 representatives of the Human Resource Council were requesting the Missoula City Council to require that the City Council require Hillview Crossing-Missoula, LLC to negotiate with Human Resource Council for use of private land to be utilized as a connecting public way road, a public use, between the Human Resource Council land and the Hillview Crossing-Missoula LLC residential townhome subdivision exemption project in order to facilitate ingress and egress motor vehicle traffic to and from the Human Resource Council property and also apparently have the effect of significantly increasing the volume of motor

vehicle traffic that would be utilizing the private streets located within the Hillview Crossing-Missoula LLC project.

Article II, section 29 of Montana's constitution states:

“Section 29. EMINENT DOMAIN. PRIVATE PROPERTY SHALL NOT BE TAKEN OR DAMAGED FOR PUBLIC USE WITHOUT JUST COMPENSATION TO THE FULL EXTENT OF THE LOSS HAVING FIRST BEEN MADE TO OR PAID INTO COURT FOR THE OWNER. IN THE EVENT OF LITIGATION, JUST COMPENSATION SHALL INCLUDE NECESSARY EXPENSES OF LITIGATION TO BE AWARDED BY THE COURT WHEN THE PRIVATE PROPERTY OWNER PREVAILS.” (emphasis added)

Title 70, chapter 30 MCA entitled “EMINENT DOMAIN” establishes similar just compensation requirements. Statutorily in Montana’s eminent domain laws, roads, streets and alleys are identified as “public uses”. The right of eminent domain may be exercised for public uses such as roads, streets, and alleys for the benefit of a city or the inhabitants of the city. See subsection 70-30-102(7) MCA. When eminent domain has not been officially initiated; yet a public use taking occurs, inverse condemnation is the legal term utilized to describe the legal aspects of the factual circumstances.

Missoula City Council members should also be aware of the Montana Supreme Court inverse condemnation decision against the City of Billings in the case of *Knight v. City of Billings*, 197 Mont. 165, 642 P. 2d 141, 1982 Mont. LEXIS 749(1982) . The factual circumstances in *Knight v. City of Billings* involved the City of Billings condemning property on one side of a then residential street in order to be able to facilitate motor vehicle traffic through a residential area to accommodate commercial development along the street. The city widened the street and installed traffic lights. The property on the opposite side of the street had a residential deed restriction. The property owners on the opposite side of the street sued in inverse condemnation. Property owner testimony identified some of the adverse impacts to them from the street widening project to include:

- (1) Significantly more motor vehicle traffic passing by their residences;
- (2) More intense street lighting, which they had unsuccessfully protested the creation of the lighting district;
- (3) Prior to the street widening the residential area had been relatively quiet;
- (4) Prior to the street widening the residences front yards had been suitable for family and social gatherings;
- (5) Prior to the street widening residents and guests could park on the street;
- (6) Prior to the street widening there was no difficulty getting in and out of residential driveways along eh street;
- (7) Prior to the street widening noise and pollutant levels were low and not distracting or harmful;
- (8) Prior to the street widening there was no undue refuse along the street; Prior to the street widening family pets were safe;
- (9) Prior to the street widening there was no noticeable vibration from passing traffic;
- (10) Prior to the street widening it was quiet at night.

The 1982 Montana Supreme Court in *Knight v. City of Billings* held that the residential property owners' property had been inversely condemned by the actions of the City of Billings. The Montana Supreme Court indicated that with respect to damages, the residential property owners were entitled to the amount of depreciation to their residential property.

The *Knight v. City of Billings* Montana Supreme Court decision is noted to the Missoula City Council in part for the reasons that in addition to Human Resource Council desiring a connecting public roadway across Hillview Crossing-Missoula private property, the Hillview Crossing Townhome subdivision exemption project zoning conditional use request is a proposal for residential neighborhood located in a private geographical area with private streets or roadways planned. The connecting roadway on currently private property that Human Resource Council desires to facilitate development of Human Resource Council land is intended to provide the ingress and egress route across private streets/roadways in order to serve the Human Resource Council property which is likely to significantly increase the motor vehicle traffic and perceived adverse side effects that accompany additional motor vehicle traffic through what is proposed to be private road private land development.

CONCLUSION:

Article II, section 29 of the Montana Constitution provides that private property shall not be taken or damaged for public use without just compensation to the full extent of the loss. Also, see the statutory provisions of title 70, chapter 30 MCA "EMINENT DOMAIN" to the same effect.

OFFICE OF THE CITY ATTORNEY

/s/ Jim Nugent

Jim Nugent, City Attorney
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