

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2018-033

TO: City Council, Mayor John Engen, Dale Bickell, Mike Haynes, Mary Mccrea, Denise Alexander, John Wilson, Kevin Slovarp, Troy Monroe, Marty Rehbein, Kirsten Hands, Kelly Elam, Ginney Merriam

FROM: Jim Nugent, City Attorney

DATE December 17, 2018

RE: In land use project approval context, City Council allowing adjacent property owner satisfaction to be necessary for adjacent land use project approval constitutes an unlawful delegation of legislative authority by City Council

FACTS:

Hillview Crossing-Missoula, LLC is proposing a residential townhome subdivision exemption development project in Missoula's south hills that is currently pending before the Missoula City Council for the purpose of obtaining conditional use zoning approval. The residential townhome project is not being proposed as a subdivision. The project is proposed as a subdivision exemption residential townhome development. Since the townhome project is being proposed as a subdivision exemption authorized pursuant to section 76-3-203 MCA, the streets or roadways within the project area will be private streets because no divisions of land is occurring that would create parcels of land for streets. Human Resource Council owns an adjacent approximate four acre parcel of land that reportedly is landlocked.

Human Resource Council representatives have been unable to obtain any agreement with Hillview Crossing-Missoula, LLC, for a connecting street extension across Hillview Crossing –Missoula, LLC, private property to the boundary with the Human Resource Council property. Human Resource Council representatives appeared at the Wednesday December 12, 2018, City Council Land Use and Planning Committee urging the City Council to, as part of the conditional use zoning, require Hillview Crossing-Missoula to negotiate with Human Resource Council with respect to creation of a connecting street from the townhome project private road(s) to the adjacent Human Resource Council land boundary. Any agreement if attained, likely would have to be an easement; since no division of land into parcels is occurring, so no sale of a parcel of land for a street would be possible. It was not clear from the Human Resource Council testimony at the City Council committee as to what would be satisfactory compliance by Hillview Crossing-Missoula or who Human Resource Council expected to finance the construction of any connecting street. No specific proposed details or guidelines were provided by Human Resource Council for the otherwise ambiguous requirement that Human Resource Council was requesting the City Council to require negotiations about.

ISSUE:

With respect to land use project or permit approvals, is there a potential legal issue if City Council action in essence delegates to an adjacent property owner the ability to determine if the land use project proceeds?

CONCLUSION:

Yes. The Montana Supreme Court in *Shannon v. City of Forsyth*, 205 Mont. 111, 666 P. 2d 750, 1983 Mont. LEXIS 745 (1983) held that it was an unlawful delegation of legislative authority for a city council to allow an adjacent property owner to in essence determine whether a land use project proceeds to implementation.

LEGAL DISCUSSION:

The Montana Supreme Court in *Shannon v. Forsyth*, 205 Mont. 111, 666 P. 2d 750, 1983 Mont. LEXIS 745(1983) declared that the Forsyth City Council ordinance that in essence required an adjacent property owner to consent to a land use proposal before it could occur was an unlawful delegation of legislative authority by the Forsyth City Council.

Pursuant to a Forsyth zoning ordinance mobile homes were excluded from a residential district unless the person desiring to implement the land use submitted a proper petition supporting the proposed use that was signed by at least 80% of the landowners residing within 300 feet of the proposed location of the mobile home and the signatures of the adjoining landowners. Shannons' owned lot 2 of block 42 that they desired to locate a mobile home onto, they submitted a petition signed by at least 80% of the designated 300 foot radius properties supporting their request. However, they were not able to obtain the signature of the lot 3, block 42 adjacent property owners. There were four mobile homes on the eastern half of the block where Shannons' owned lot 2, including on adjacent lot 3. The Forsyth city clerk rejected the Shannon petition based on the city ordinance not being complied with. Some property owners who signed the petition, then started withdrawing their signatures when they learned that the owner of lot 3 would not sign the petition. Mr. Shannon then deeded to his mother and step father a one foot strip of land along the lot 2 boundary with lot 3; so that lot 3 was no longer adjacent to lot 2, which the City would not honor.

Litigation ensued pursuant to which Shannons challenged the constitutionality of the Forsyth zoning ordinance. The Montana Supreme Court agreed with Shannon's that the City of Forsyth zoning ordinance unlawfully delegated legislative authority to landowners residing within 300 feet and to adjacent landowners; because the City of Forsyth zoning ordinance deprived Shannon's of due process and equal protection under the 1st and 14th Amendments to the United States Constitution and Article II, Sections 4 and 17 of the Montana Constitution.

The Montana Supreme Court labeled the City of Forsyth ordinance as being a "consent" ordinance and stated that "a 'consent' ordinance will fail if it is found to be arbitrary or capricious".

The Montana Supreme Court further went on to state:

“. . . The ordinance provides no standard whatsoever by which the consents may be judged. The effect of the ordinance is to make the right to locate the mobile home in a “Residential A” district development wholly on the will and whim of the adjoining owners and 80% of the owners within 300 feet of the property without any sensible fixed guidelines or standards, calculated to protect the interests of the inhabitants. The result is unequal treatment under the law. Kasten 717. The ‘consent ordinance’ is also arbitrary and capricious, since the exercise of a negative vote by one resident could defeat the Shannons’ petition. The arbitrariness of the ordinance is obvious when the Shannons’ adjoining neighbors, who live in a mobile home, can withhold their consent and deny the Shannons the right to locate a mobile home on their property.

The Montana Supreme Court then went on to also state that the City of Forsyth zoning ordinance was also an unwarranted application of police power stating:

“The ‘consent’ ordinance also represents an unwarranted application of police powers. This Court stated in *Freeman v. Board of Adjustment* (1934) 97 Mont. 432, 356, 34 P. 2d 534, ‘In order for an ordinance to comply with the requirements essential to the exercise of police power . . . it is essential that there should be an appellate body, such as the board of adjustment, with the power to consider exceptional cases . . .’”

The Montana Supreme Court in *Shannon* then concluded that the City of Forsyth ‘consent’ ordinance was unconstitutional as an unlawful delegation of legislative authority and police power.

A subsequent Montana Supreme Court case, *Williams v. Board of Missoula County Commissioners*, 2013 Mt 243, 371 Mont. 356, 38 P 3d 88, 2013 Mont. LEXIS 332 (2013) in discussing the *Shannon* decision stated that in a zoning context any attempted lawful delegation of legislative authority “must contain standards or guidelines” to inform the propriety of the exercise of that power. When no standards or guidelines are present, the exercise of the delegated power may result in arbitrary and capricious actions dependent wholly on the will of others which would constitute an unlawful delegation of governing body authority to others.

In the *Williams v. Board of Missoula County Commissioners* decision some county property owners had utilized the protest provisions of county zoning law 76-2-205(6) MCA to block the County Commissioners from establishing a special zoning district north of Lolo, Montana. The Montana Supreme Court indicated that letting a certain percentage of landowners block zoning rules, unconstitutionally delegated legislative power because no standards informed the power, and it had no legislative bypass. Thus, a small number of landowners could decide the public interest without review.

Any city council land use action that in essence empowers an adjacent property owner and/or another property owner a deciding role in determining whether the land use project is allowed to proceed is an unlawful delegation of legislative authority by the city council. It would be an

unlawful delegation of city council legislative authority if the city council conditioned the conditional use zoning for Hillview Crossing-Missoula LLC on successful street connection negotiations with the adjacent property owner, Human Resource Council. In this instance, in addition to any legal concerns about the ambiguity of any such negotiation as a requirement, it must be noted that any such directive would be without any city council established standards or guidelines being in place. In this instance, there would also be the additional potential legal issue of a potential taking of property for public use of others if the City Council mandated that in a private land subdivision exemption project must provide a street connection to adjacent land must be negotiated in order for a land use project to be approved.

CONCLUSION:

Yes. The Montana Supreme Court in *Shannon v. City of Forsyth*, 205 Mont. 111, 666 P. 2d 750, 1983 Mont. LEXIS 745 (1983) held that it was an unlawful delegation of legislative authority for a city council to allow an adjacent property owner to in essence determine whether a land use project proceeds to implementation.

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/s/ Jim Nugent

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