

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2019-002

**TO:** John Engen, Mayor, City Council, Dale Bickell, Mike Haynes, Mary McCrea, Andrew Boughan, Denise Alexander, Anita McNamara, Jenny Baker, Marty Rehbein, Kirsten Hands, Ellen Buchanan, Erin Pehan, Chris Behan, Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** January 30, 2019

**RE:** Local government land use rezoning/zoning decisions must be based on evidence and information that has fact and foundation that does not consist chiefly of emotional outbursts by citizens.

### **FACTS:**

Soon there will be a city council public hearing on a rezoning proposal that split the planning board 6 in favor and 2 opposed that reportedly included citizen public comment that was somewhat emotional.

### **ISSUE:**

What weight should a local government governing body give homeowner/citizen emotional comments with respect to land use rezonings/zonings where there is little or no actual factual evidence to support the emotional testimony or written comments?

### **CONCLUSION:**

The Montana Supreme Court in *Lowe v. City of Missoula* 165 Mont. 38, 525 P.2d 551; 1974 Mont. LEXIS 388(1974) stated that citizen homeowner comment that provided little actual evidence supporting the assertions pertaining to the rezoning land use proposal consisted chiefly of emotional outbursts that were not actual evidence. The Montana Supreme Court further indicated that the proper standard of review is for the local governing body decision making to be guided by actual evidence that has fact and foundation.

### **LEGAL DISCUSSION:**

The Montana Supreme Court decision in *Lowe v. City of Missoula* 165 Mont. 38, 525 P. 2d 551; 1974 Mont. LEXIS. 388(1974) involved an attempted rezoning of portions of waterworks hill on the west side of Greenough Drive by homeowners on the east side of Greenough Drive. The

homeowners petitioning for the rezoning were seeking to rezone the land to RR-1 restricted one family residential from a then applicable B-1 zoning classification. The developer desired to build an apartment complex on their land zoned B-1 that allowed apartments. Both the Missoula City Council and the District Court sided with the homeowners seeking rezoning and adopted and approved the rezoning.

On appeal the plaintiff landowners attorney in legal briefing individually divided the municipal zoning criteria in section 76-2-304 MCA into 12 tests; analyzed their applicability to the testimony and facts of the case and successfully argued that the testimony before the City Council failed to meet the 12 statutory criteria (tests). Montana municipal zoning law section 76-2-304 MCA has been since amended; but still generally sets forth similar zoning review criteria.

In part of its decision, the Montana Supreme Court spends quite a bit of time focusing on necessity for actual evidence that establishes fact and foundation for the city council's decision. During this Montana Supreme Court analysis the Supreme Court notes that homeowner assertions that consist chiefly of emotional outbursts are not evidence. The Montana Supreme Court in Lowe concluded that the evidence introduced at the City Council and in the trial court was so lacking in factual information that the City Council's action adopting the rezoning and the District Court's approval of the City Council decision could be said to be based on mistakes of fact, thereby constituting an abuse of discretion, that reversal of the trial court was required. See *supra* at 551.

The Montana Supreme Court stated *supra* at 553 that:

"In summarizing the evidence introduced at the City Council and in district court we note the record is so lacking in fact foundation that the action on the part of the City Council and the district court could be said to have been based on mistakes of fact, thereby constituting an abuse of discretion."

The Montana Supreme Court then went on to state *supra* at 555 that:

" . . . . Where the information upon which the City Council and the district court acted is so lacking in fact and foundation, as hereinbefore noted, it is clearly a mistake of fact and constitutes an abuse of discretion. It is within the power of this Court to correct this mistake by judicial review of the entire record?

With respect to the emotional testimony of homeowners, later on page 555, the Montana Supreme Court states:

"Considering the volatility of problems that arise under zoning ordinances and laws regulating the use of land, WE NOTE WITH APPROVAL THE LANGUAGE OF THE FEDERAL COURT OF THE DISTRICT OF COLUMBIA, in *American University v. Prentiss*, 113 F. Supp. 389, 393, affd., 94 U. S. App. D. C. 204, 214 F. 2d 282, 348 U. S. 898, 99 L. Ed. 705, 75 S. Ct. 217, (emphasis added) wherein the court held:

“\* \* \* \* Although possible impairment of property values seemed to be the main argument, very little actual evidence on the subject was produced. THE TESTIMONY CONSISTED CHIEFLY OF EMOTIONAL OUTBURSTS ON THE PART OF THE INDIVIDUAL HOMEOWNERS, TO THE GENERAL EFFECT THAT THEY HAD BEEN INFORMED BY REAL ESTATE EXPERTS THAT IF THE HOSPITAL WERE ERECTED, THE VALUE OF THEIR PROPERTY WOULD DECREASE ANYWHERE FROM THIRTY-FIVE TO FIFTY PERCENT. NATURALLY SUCH ASSERTIONS ARE NOT EVIDENCE. \* \* \* \*.” (emphasis added)

“It is well established that administrative agencies are not required to apply the rules of law governing admissibility of evidence. These rules are binding only on judicial tribunals. NEVERTHELESS, THE PROBATIVE WEIGHT OF EVIDENCE IS THE SAME, IRRESPECTIVE OF WHERE THE EVIDENCE IS INTRODUCED, AND MUST BE TESTED BY THE SAME STANDARDS WHETHER IT IS TENDERED TO A COURT OR TO AN ADMINISTRATIVE BODY.” (emphasis added)

The Montana Supreme Court concluded *supra* at 555 that “In view of the mistake of facts submitted to the City Council and upon which the District Court based its decision, we find such was an abuse of discretion necessitating reversal.

### **CONCLUSION:**

The Montana Supreme Court in *Lowe v. City of Missoula* 165 Mont. 38, 525 P.2d 551; 1974 Mont. LEXIS 388(1974) stated that citizen homeowner comment that provided little actual evidence supporting the assertions pertaining to the rezoning land use proposal consisted chiefly of emotional outbursts that were not actual evidence. The Montana Supreme Court further indicated that the proper standard of review is for the local governing body decision making to be guided by actual evidence that has fact and foundation.

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/s/

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