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Legal Opinion 2019-009

TO: Mayor John Engen, City Council, Dale Bickell, Ginny Merriam, Marty Rehbein, Mike Haynes, Kevin Slovarp, Troy Monroe, Jeremy Keene, Eric Andersen, Department Attorney

FROM: Jim Nugent, City Attorney

DATE April 1, 2019

RE: Public participation pursuant to Montana law requires that a city council agenda allow public comment on any public matter that is not on the agenda of the meeting that is within the jurisdiction of the city council. However, the city council may not take action on any non-agenda item discussed unless the agenda has specific notice of the item on their agenda for that meeting

FACTS:

It is possible that at this evening's city council meeting an attorney and possibly others will attend the city council meeting to express concerns about the city process for removing the alley barricade at the current Hoagieville site on South Higgins. A letter dated March 28, 2019 from attorney Douglas G. Skjelset expressing concerns about the Monday March 25, 2019 City council vote to remove the alley barrier at Hoagieville was received Friday morning March 29, 2019 at 9:30 A. M. according to the city clerk office stamp on the letter.

ISSUE:

If the city council receives public comment at any of its meetings on a non-agenda item that is discussed at the city council meeting, what limitations exist with respect to the city council's ability to take action at that specific meeting?

CONCLUSION:

Montana state law requires that the agenda for a public body, such as the city council, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the city council. However, pursuant to subsection 2-3-

103(1)(a) MCA the city council may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on the matter.

LEGAL DISCUSSION:

Montana's Constitution pursuant to Article II, section 8 establishes a Constitutional right of reasonable participation in the operation of government agencies prior to a final decision being made.

The Montana State Legislature has also adopted legislation providing for public participation in government operations prior to a final decision being made. Title 2, chapter 3 MCA is entitled "PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS". Section 2-3-101 MCA specifically provides that it is necessary to establish guidelines for the people to secure their Montana Constitutional reasonable right of public participation prior to the final decision being made by the public body.

Section 2-3-103 MCA requires that each public agency develop procedures for permitting and encouraging the public to participate in decisions of significant interest to the public. Section 2-3-103 MCA states in its entirety as follows:

"2-3-103. Public participation -- governor to ensure guidelines adopted. (1) (a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public. The agenda for a meeting, as defined in **2-3-202**, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in **2-3-212**.

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request."

Section 2-3-103 MCA set forth immediately above expressly requires that the agenda for any meeting "must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting."

Section 2-3-103 MCA then goes on to state: “However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter.”

The definition of the term “agency” is set forth in subsection 2-3-102(1) MCA includes local governments.

It is my understanding from the City Clerk’s Office that the Hoagieville alley barrier topic is not specifically on tonight’s city council agenda. Therefore, if an attorney and/or citizens attend the city council meeting this evening to address the Hoagieville alley barrier, while some discussion may occur, the city council may not take action at tonight’s city council meeting; because the specific topic of the Hoagieville alley barrier is not on the agenda and no public comment received pertaining to the topic being back on the city council agenda.

Missoula City Council rule 20 entitled RECONSIDERATION sets forth the Missoula City Council’s current process and procedure for reconsidering an item after the city council has acted on the item. Missoula City Council rule 20 states:

“Rule 20. RECONSIDERATION.

A motion to reconsider any action may be made at any time before or during the second regular meeting after such action is taken. Such a motion may be made only if it has been regularly placed on the agenda (see Rule 11(A)) by a Council member who voted with the prevailing side in the original vote on the item. Approval of a motion to reconsider requires two-thirds of those members present and voting.”

CONCLUSION:

Montana state law requires that the agenda for a public body, such as the city council, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the city council. However, pursuant to subsection 2-3-103(1)(a) MCA the city council may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on the matter.

OFFICE OF THE CITY ATTORNEY

/s/ Jim Nugent

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