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Legal Opinion 2019-027

TO: Mayor John Engen, City Council, Dale Bickell, Jeremy Keene, Jenny Baker, Denise Alexander, Mary McCrea, Andrew Boughan, Jen Gress, Ginny Merriam, Dennis Bowman, Kevin Slovarp, Troy Monroe, Donna Gaukler, Ben Brewer, Marty Rehbein, Kirsten Hands, Kelly Elam, Department Attorney

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE September 19, 2019

RE: Montana municipal zoning law requires favorable vote by at least two-thirds of the city council members present and voting in order for a zoning measure to become effective when there has been a sufficient statutory protest pursuant to section 76-2-305 MCA.

FACTS:

It appears that there might be a sufficient property owner protest for an upcoming rezoning to trigger the necessity for an extraordinary majority vote of the city council in order for the rezoning measure to become effective.

ISSUE:

If there is a sufficient property owner protest against a zoning proposal, what is the extraordinary city council vote necessary to overcome the zoning protest in order for the zoning measure to become effective?

CONCLUSION:

Pursuant to subsection 76-2-305(2) MCA in order for a sufficiently statutorily protested zoning measure to become effective requires the favorable vote of two-thirds of the city council members who are present and voting.

LEGAL DISCUSSION:

Title 76, chapter 2, Montana Code Annotated (MCA) is entitled “PLANNING AND ZONING”. Part 1 of title 76, chapter 2 MCA is entitled “MUNICIPAL ZONING”.

Section 76-2-305 MCA is entitled “ALTERATION OF ZONING REGULATIONS-PROTEST”. Section 76-2-305 MCA states as follows:

76-2-305. Alteration of zoning regulations -- protest. (1) A regulation, restriction, and boundary may be amended, supplemented, changed, modified, or repealed. The provisions of **76-2-303** relative to public hearings and official notice apply equally to all changes or amendments.

(2) An amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city or town council or legislative body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of:

- (a) the area of the lots included in any proposed change; or
- (b) those lots or units, as defined in **70-23-102**, 150 feet from a lot included in a proposed change.

(3) (a) For purposes of subsection (2), each unit owner is entitled to have the percentage of the unit owner's undivided interest in the common elements of the condominium, as expressed in the declaration, included in the calculation of the protest. If the property, as defined in **70-23-102**, spans more than one lot, the percentage of the unit owner's undivided interest in the common elements must be multiplied by the total number of lots upon which the property is located.

(b) The percentage of the unit owner's undivided interest must be certified as correct by the unit owner seeking to protest a change pursuant to subsection (2) or by the presiding officer of the association of unit owners. (emphasis added)

Subsection 76-2-305(2) MCA is the Montana municipal zoning statutory provision pertaining to zoning protests. If there is sufficient statutory protest to the zoning measure to necessitate an extraordinary vote of a majority of the city council in order for the zoning measure to go into effect, an extraordinary majority consisting of at least a favorable vote of two-thirds of the city council members present and voting is required.

The property owners entitled to statutorily protest and potentially trigger a zoning protest that triggers the necessity for a favorable vote of two thirds of the present and voting city council members are set forth in subsection 76-2-305(2)(a) and (b) MCA. The statutory definition of the term “unit” that is cross referenced to within subsection 76-2-305(2)(b) MCA is defined in subsection 70-23-102(16) MCA as meaning:

“(16) ‘Unit’ means a part of the property including one or more rooms occupying one or more floors or a part or parts of the property intended for any type of independent use and with a direct exit to a public street or highway or a common area or area leading to a public street or highway.”

Note that effective October 1, 2019, the statutory cite to this statutory definition will become 70-23-102(19) MCA. The 2019 Montana State Legislature added three definitions to this section of Montana state law defining “borrower”, “Conversion” and “Lienholder”. See Chapter 323 LAWS OF MONTANA, volume II, Senate Bill 276(2019). These three newly inserted definitions did not affect the statutory definition of “Unit”. Since there was no specific special effective date for SB-276(2019) by law SB-276(2019) becomes effective October 1; pursuant to subsection 1-2-201(1) MCA.

CONCLUSION:

Pursuant to subsection 76-2-305(2) MCA in order for a sufficiently statutorily protested zoning measure to become effective requires the favorable vote of two-thirds of the city council members who are present and voting.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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