

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2022-009

TO: City Council, Mayor John Engen Dale Bickell, Eran Pehan, Mary Mccrea, Dave DeGrandpre, Alex Eidam, Cassie Tripard, Lauren Stevens, Jeremy Keene, Kevin Slovarp, Troy Monroe, Donna Gaukler, Ellen Buchanan, Department City Clerk

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 23, 2022

RE: Quasi-judicial land use decisions pursuant to the appearance of fairness legal doctrine require that decisions be made by decision makers who are neutral, fair, impartial, objective, open-minded, and equitable.

FACTS:

A reminder has been requested that city elected officials be reminded that their quasi-judicial land use decisions pursuant to the “appearance of fairness” legal doctrine are required to be made by decision makers who are neutral, fair, impartial, objective, open minded, and equitable.

ISSUE(S):

What does the “appearance of fairness” legal doctrine with respect to quasi-judicial land use decisions require?

CONCLUSION(S):

Pursuant to the “appearance of fairness” legal doctrine with respect to quasi-judicial land use decisions, the land use decision must be fair and appear to be fair in order to be valid.

LEGAL DISCUSSION:

83 Am Jur 2d ZONING AND PLANNING, section 688 entitled CONFLICT OF INTEREST, provides that a public official decision maker who has a direct personal interest in a land use matter must disqualify themselves. In addition 83 Am Jur 2d, section 688 provides that conflict of interest also means that the status of each decision maker member of a land use decision making body is forbidden from placing themselves in a position, where private interests or conduct places them in conflict with their public duty. Examples of land use decision maker

conduct that violates public policy, include land use decision maker conduct such as favoritism toward one party or hostility toward a party; or conduct that creates a personal bias or personal prejudice which imperils the open mindedness and sense of fairness which the land use decision maker is required to possess.

A land use decision maker with a conflict of interest should not participate in the land use decision making;..

The next section of 83 Am Jur 2d, is section 689 and it is entitled “APPEARANCE OF FAIRNESS STANDARD” The “appearance of fairness” legal doctrine moves beyond obvious conflicts of interest and requires adherence to an “appearance of fairness” legal doctrine. The “appearance of fairness” legal doctrine requires the quasi-judicial land use decisions, such as rezones, must be fair, and appear to be fair, in order to be valid.

The “appearance of fairness” legal doctrine requires that the decision making process be fair, impartial, objective, neutral, open-minded equitable until the decision makers are at their land use decision making point in time. After public participation, public right to know and public hearings have concluded, land use decision maker discussion and debate occurs. Pursuant to the “appearance of fairness” legal doctrine; the land use decision makers are expected to “act like a judicial body bound by ethical standards comparable to those that govern a court in performing the same function.”. The “appearance of fairness” legal doctrine is intended to provide everyone with confidence that the land use decision making process is fair as well as appear to be fair.

Montana’s Constitution as well as Montana state laws require that the public has both a right to know as well as a right to public participation with respect to any upcoming land use decision prior to the land use decision being made. Any and all communications from any source by any party pertaining to the upcoming land use decision should be placed in the public record with a reasonable opportunity for public participation prior to a final decision being made. Adherence to the public right to know and public participation legal principles allows for public comment on the information that the land use decision makers are being presented with that might influence their decision. Right to know and public participation allow adjacent and nearby property owners to learn what the proponent professional engineer/architect/developer are stating as well as allow the professional engineer/architect/developer to know what the adjacent to nearby property owners are stating.

The right to know and the right to public participation are also important for creating a thorough public record supported by accurate actual evidence for land use decision making as is evidenced by a 1974 Montana Supreme Court decision against the Missoula City Council. The Montana Supreme Court in 1974 in *Lowe v. City of Missoula*, 165 Mont. 38. 525 P 2d 551, 1974 LEXIS 388(1974); noted and emphasized that when ruling against the Missoula City Council with respect to the rezoning of Water Works Hill by the City of Missoula it is important; that the land use decision be based on actual evidence; not emotionalism and much of the citizen homeowner testimony in *Lowe* was emotionalism not actual evidence.

Therefore, no land use decision maker is allowed to express desire or intent to support or oppose the final decision prior to the decision makers discussing and debating the proposed land use

action after the conclusion of all public participation related to the upcoming land use proposal. The Montana Supreme Court in *Lowe*, supra stated that citizen homeowner comment provided little actual evidence supporting the assertions pertaining to the land use rezoning proposal and that citizen comment consisted chiefly of emotional outbursts that were not actual evidence. The Montana Supreme Court in part indicated that the proper land use review standard is to be guided by actual evidence that has fact and foundation. Public right to know and public participation are important to land use decision making.

CONCLUSION(S):

Pursuant to the “appearance of fairness” legal doctrine with respect to quasi-judicial land use decisions, the land use decision must be fair and appear to be fair in order to be valid.

OFFICE OF THE CITY ATTORNEY

/s/ Jim Nugent

Jim Nugent, City Attorney

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