

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2009-008

**TO:** Jordan Hess, City Council, Eran Pehan, Cassie Tripard, Dave DeGrandpre, Alex Bramlette, Mary McCrea, Spencer Starke, Department Mayor's Office, Department City Clerk

**CC:** Department City Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** May 16<sup>th</sup>, 2023

**RE:** Spot zoning may be legally permissible; especially when it substantially complies with the applicable growth policy.

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### **FACTS:**

During the Monday evening May 15<sup>th</sup>, 2023 Missoula City Council meeting there was some citizen concern expressed about potential illegal spot zoning with respect to a proposed rezoning pending before the City Council.

### **ISSUE(S):**

May spot zoning be permissible or legal?

### **CONCLUSION(S):**

Yes, spot zoning may be permissible and legal especially when it substantially complies with applicable growth policy and is not special legislation for the purpose of benefiting someone at the expense of the general public.

### **LEGAL DISCUSSION:**

A growth policy is not a regulatory document and does not confer authority to regulate. However, after adoption of a growth policy the governing body within the area covered by the growth policy must be guided by and give consideration to the general policy and pattern of

development set out in the growth policy in the adoption of zoning ordinances or resolutions. See section §76-1-605 MCA.

The Montana Supreme Court indicated in a Missoula case that not every city zoning proposal will be consistent with every goal and objective expressed in a city's growth plan documents. However, the City of Missoula's modified zoning proposal complied with the growth plan; so the proposed modified rezoning was upheld. The proposed zoning complied with the applicable growth plan by improving existing businesses and enhancing the growth of the anchor institutions located in the West Broadway area which was considered to be in the public interest. The Montana Supreme Court held that the zoning proposal did not constitute illegal spot zoning. *Citizen Advocates for a Livable Missoula, Inc. v. City Council*, 2006 MT. 47, 331 M 269, 130 P 3d 1259(2006), following *Little v. Board of County Commissioners*, 193 M 334, 631 P 2d 1282(1981)

In another Missoula case, the Montana Supreme Court indicated that a governing body must substantially comply with its growth policy when making zoning decisions. *Heffernan v. Missoula City Council*, 2011 MT 91, paragraph 79, 360 Mont. 207, 255 P. 3d 80; *Helena Sand & Gravel Inc. V. Lewis & Clark County, Planning and Zoning Commission*, 2012 Mt 272, paragraph 31, 367 Mont. 130, 290 P. 3d 691; and *Little Supra*. Zone changes for property owned by one person are not always impermissible spot zoning. *Helena Sand & Gravel, supra*.

Montana courts historically utilized a three part review to determine if impermissible spot zoning had occurred. The three parts were generally identified in *Little, supra* and *Boland v. City of Great Falls*, 275 Mont. 128, 134, 910 P. 2d 890, 894 (1996) as being (1) whether the requested use is significantly different from the prevailing use in the area; (2) whether the area in which the requested use is to apply is rather small; (3) whether the area in which the requested change is more in the nature of special legislation. The Montana Supreme Court in *Boland* indicated that parts 2 and 3 are to be reviewed together in combination.

The fact that a zoning ordinance is perceived as benefiting the property owner(s) is not sufficient to show that the ordinance was enacted for the purpose of benefiting the property owner(s) at the expense of the general public. *N. 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County*, 2006 Mt 132 paragraph 70, 332 Mont. 327, 137 P. 3d 557 concluding that the zoning amendment's requested use complied with the growth policy and thus the landowner's sole ownership of the parcel did not indicate that the zoning amendment was adopted at the expense of the surrounding landowners or the general public.

After a growth policy is adopted, zoning ordinances and other planning documents adopted after the growth policy must be consistent with the growth policy. Recently the Montana Supreme Court in *Hartshorne v. City of Whitefish*, 2021 Mt 116(2021) held the District Court properly found that the City of Whitefish acted properly within its discretion in enacting a zoning ordinance because it substantially complied with the neighborhood plan which contemplated commercial areas in the proposed neighborhood and that the District Court had properly applied the three part test as part of its review.

**CONCLUSION(S):**

Yes, spot zoning may be permissible and legal, especially when it substantially complies with the applicable growth policy and is not special legislation for the purpose of benefitting someone at the expense of the general public.

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A handwritten signature in black ink, appearing to read "Jim Nugent", enclosed in a thin rectangular border.

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Jim Nugent, City Attorney

JN: mcs