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Legal Opinion 2023-009

TO: Mayor Jordan Hess, City Council, Dale Bickell, Department City Clerk, Department Mayor's Office

CC: Department City Attorney

FROM: Jim Nugent, City Attorney

DATE 05/17/2023

RE: Agenda for an open meeting must include an item allowing public comment on any public matter 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.

FACTS:

There has been some recent controversy pertaining to public comment on non-agenda items at Monday evening City Council meetings.

ISSUE(S):

What is the intended statutory scope of public comment on non-agenda items/topics at City Council open meetings?

CONCLUSION(S):

§ 2-3-103 MCA of Montana's public participation laws provides that an agenda for an open meeting must include an item allowing public comment on any public matter within the jurisdiction of the agency conducting the meeting.

LEGAL DISCUSSION:

The 2003 Montana State Legislature adopted HB-94(2003) which in pertinent part was entitled “An act revising and clarifying the public participation and notice requirements for open meetings; providing that an agenda for an open meeting must include an item allowing public comment on any public matter within the jurisdiction of the agency conducting the meeting; clarifying that an 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; clarifying what constitutes a public matter”. See Montana session laws, LAWS OF MONTANA, volume II, chapter 425, pages 1579-1580, FIFTY-EIGHTH LEGISLATURE 2003.

HB-94(2003) amended § 2-3-103 MCA. The clarification of the term “public matter” was an adoption of a provision that stated that “public matter” does not include contested case and other adjudicative proceedings. See § 2-3-103(1)(b) MCA.

The statutory intent of HB-94(2003) was that an agenda for a public agency public open meeting provide an opportunity for public comment on any public matter that is within the jurisdiction of the public agency conducting the meeting. In addition, HB-94(2003) also adopted a limitation that a public agency may not take action on any non-agenda matter discussed unless there was specific notice of that matter included on the agenda and public comment has been allowed.

The relevant specific language HB-94(2003) inserted into section § 2-3-103 MCA is set forth in the fifth through ninth lines and states:

“. . . 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 the matter is included on an agenda and public comment has been allowed on that matter. . . .” (emphasis added)

§ 2-3-103 MCA states in its entirety as follows:

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.

CONCLUSION(S):

§ 2-3-103 MCA of Montana's public participation laws provides that an agenda for an open meeting must include an item allowing public comment on any public matter within the jurisdiction of the agency conducting the meeting.

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

Jim Nugent, City Attorney

JN:mcs