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Legal Opinion 2009-020

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Marty Rehbein, City Clerk; Nikki Rogers; Kelly Elam; Ginny Merriam

CC: Legal Staff

FROM: Jim Nugent

DATE: November 25, 2009

RE: Section 2-3-103 MCA Public Comment at Government Agency Meetings on Non-Agenda Items are Identified to be for Public Matters within the Jurisdiction of the Agency

FACTS:

Recently some City Council members have expressed interest to the City Clerk's and City Attorney's offices in establishing specific time limits for public citizen speakers at City Council meetings. Currently City Council rules do not establish specific time limits for public comment whether public comment pertains to agenda or non-agenda items. With respect to public hearings, City Council Rule 14(B) does state that "at the commencement of any public hearing, the presiding officer shall set time limits for the presentation of views of proponents and opponents of the measure. These time limits shall be adhered to strictly." Current City Council Rule 15 pertaining to citizen participation in decisionmaking provides in pertinent part that "The Presiding Officer may reasonably limit audience participation at any time."

Also, there have been instances of public comment at City Council meetings on non-agenda items addressing matters that are not within the jurisdiction of city municipal government.

If the City Council considers any amendments to its current City Council Rules in order to address potentially establishing time limits for public comment at city council meetings, the City Council may also desire to address public comment on non-agenda "public matter" items that are not within the jurisdiction of the city.

ISSUE(S):

What does Montana State law currently state with respect to a government agency providing for public comment on non-agenda “public matter” items at a government meeting?

CONCLUSION(S):

Currently, §2-3-103(1) MCA provides that public government agencies must allow for public comment on any “public matter” that is not on the agenda of the meeting and that is within the jurisdiction of the government agency conducting the meeting. However, the government agency may not take action on any non-agenda matter discussed. Specific notice of any matter acted on must be identified and included on the agenda and public comment must have been allowed on that matter.

LEGAL DISCUSSION:

Article II, Section 8 of Montana’s Constitution pertaining to citizen right of participation in government operations provides:

Section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law. (Emphasis added.)

Montana’s general public participation in governmental operation statutes in Title 2, Chapter 3, MCA commences with §2-3-101 MCA which provides:

Part 1 Notice and Opportunity to Be Heard

2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency. (Emphasis added.)

“Reasonable opportunity” will vary to some degree, depending on the specific agenda item or decision being made. For example, a “reasonable opportunity” for an applicant for a zoning or subdivision approval will likely mean that the applicant is afforded more time to present their application than what members of the general public might be allowed.

Sections 7-1-4142 and 7-1-4143 MCA of Montana Municipal government statute provide:

7-1-4142. Public participation. Each municipal governing body, committee, board, authority, or entity, in accordance with Article II, section 8, of the Montana constitution and Title 2, chapter 3, shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public.

7-1-4143. Participation. In any meeting required to be open to the public, the governing body, committee, board, authority, or entity shall adopt rules for conducting the meeting, affording citizens a reasonable opportunity to participate prior to the final decision. (Emphasis added.)

Pursuant to Montana Municipal government statutes such as §§7-5-4103 and 7-5-4121 MCA a city council may determine the operating rules for its city council meetings. These state statutory provisions provide:

7-5-4103. Council rules and discipline. The council may determine the rules of its proceedings, punish its members for improper conduct, and expel any member for the same by a two-thirds vote of the members elected.

7-5-4121. Conduct of council business. (1) A majority of the members of the council constitute a quorum for the transaction of business, but a less number may meet and adjourn to any time stated and may compel the attendance of absent members, under such rules and penalties as the council may prescribe.

(2) The ayes and noes must be called and recorded on the final passage of any ordinance, bylaw, or resolution or the making of any contract. The voting on the election or appointment of any officer must be *viva voce*. A majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded. (Emphasis added.)

Title 2, Chapter 3 MCA entitled “Public Participation in Governmental Operations” pursuant to Part 1 entitled “Notice and Opportunity to be Heard” specifically addresses public citizen comment on non-agenda items at government agency meetings pursuant to §2-3-103 MCA entitled “Public Participation – Governor to Ensure Guidelines Adopted”.

Section 2—3-103 MCA provides:

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. (Emphasis added.)

Subsection 2-3-102(1) MCA defining "Agency" defines "agency" to include local governments.

Basically the Montana State Legislature adopted statutory criteria for non-agenda item public comment, required to be allowed at government agency meetings are (1) comment on a public matter, (2) not on the agenda of the government agency meeting (3) that is within the jurisdiction of the government agency conducting the meeting.

The above quoted statutory language in §2-3-103 MCA pertaining to government agency allowing public comment on non-agenda public matters within the jurisdiction of the government agency was inserted into §2-3-103 MCA in 2003 pursuant to House Bill 94. Pursuant to 51 Montana Attorney General Opinion No. 12 (12/30/2005) issued to the Billings City Attorney, Montana Attorney General Mike McGrath concluded that this statutory mandate only applied to public comments directed to matters of significant interest to the public. Attorney General McGrath stated at page 7 of his Attorney General Opinion:

I conclude that when HB 94 requires an agenda item for public comment on non-agenda matters, this mandate is imposed upon a city council only to the extent that the comments are directed to matters of significant interest to the public. The express purpose of Mont. Code Ann. § 7-1-4142 is to permit and encourage "the public to participate in decisions that are of significant interest to the public." House Bill 94 is inconsistent with the purpose of Mont. Cod Ann. § 7-1-4142 to the extent that it would require the council to allow public comment on matters that are not of significant interest to the public. However, related statutes must be harmonized to the extent possible, as enunciated by the Montana Supreme Court in Gregg. Therefore the city council must provide an agenda item for public comment on non-agenda, public matters. But it is not required to take public comment on matters that are not of significant interest to the public. (Emphasis added.)

Later at page 8 of his Attorney General Opinion when addressing the Billings City Council's informal work sessions, Attorney General McGrath stated:

Therefore, the informal work sessions of the council must be considered "meetings" to which the public participation provisions apply. Consistent with Par I, the council must include on the agenda for its informal meetings a period for public comment on non-agenda items of significant interest to the public that are within the jurisdiction of the council. The sessions need not permit public

comment on non-agenda matters that are not of significant interest to the public.
(Emphasis added.)

Then at page 9 of his Attorney General Opinion, Attorney General Mike McGrath discusses further Montana Attorney General Joe Mazurek's interpretation of the meaning of the statutory phase "significant interest to the public":

".... For purposes of implementing Mont. Code Ann. § 2-3-103, House Bill 94 specifically excluded from the definition of "public matter" any "contested case or other adjudicative proceeding." Mont. Code Ann. § 2-3-103(1)(b). The bill included no other exceptions. In construing a statute one may not "insert what has been omitted or omit what has been inserted." Mont. Code Ann. § 1-2-101. Therefore, recognition of a broad exception for any matter involving an individual privacy right is inappropriate.

However, in 47 Op. Att'y Gen. No. 12 (1998), Attorney General Mazurek addressed the question of the meaning of the phrase "significant interest to the public" in a manner that provides some guidance here. In that opinion, after noting the absence of any helpful authority, General Mazurek opined that "any non-ministerial decision or action of a county commission which has meaning to or affects a portion of the community requires notice to the public and opportunity for the public to participate in the decision making process." This definition may in fact address the issue with which Senator Mangan had concern. (Emphasis added.)

CONCLUSION(S):

Currently, §2-3-103(1) MCA provides that public government agencies must allow for public comment on any "public matter" that is not on the agenda of the meeting and that is within the jurisdiction of the government agency conducting the meeting. However, the government agency may not take action on any non-agenda matter discussed. Specific notice of any matter acted on must be identified and is included on the agenda and public comment must have been allowed on that matter.

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/s/
Jim Nugent, City Attorney

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