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Legal Opinion 2011-002

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Mike Barton, Interim Director of OPG; Denise Alexander, Principal Planner, Permits & Projects OPG; Mary McCrea, Senior Planner OPG; Tim Worley, Planner III OPG; Janet Rhoades, Planner II OPG; Pat Keiley, Planner III OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Don Verrue, Building Official

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE January 10, 2011

RE: Validity of "spot" or "island" zoning depends on the factual circumstances reviewed in each instance

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FACTS:

Territorial Landworks Inc., representing TLI Properties LLC at 620 Addison, and adjacent McCue Construction at 826 Kern seek rezoning from RM1-45 (residential multi-dwelling) to B1-1 (neighborhood commercial, intensity designator =1) for existing decades old light commercial type uses prior to potentially investing further in their respective properties. These lands are located in the northwest portion of Slant Street area east of Russell Street.

The 620 Addison applicant requests rezoning to make an existing legal non-conforming use legally conforming. Reportedly there is documentation that commercial type uses have existed at 620 Addison for at least 53 years, since 1958. The applicant is also considering the possibility of future building remodel and expansion. Adjacent McCue Construction at 826 Kern requests rezoning to bring an existing non-conforming use in to greater conformity. McCue Construction reportedly has existed at 826 Kern for at least 57 years, since 1954. Nearby, roughly one full block south of the property proposed for rezoning, east of Russell and south of Harlem the properties are zoned with a commercial land use designation. Actual existing decades old land uses for the two properties seeking rezoning are apparently not identified in the growth policy even though growth policies are expected to include surveys of existing land uses as they exist pursuant to Mont. Code Ann. § 76-1-601; Citizen Advocates for a Livable Missoula, Inc. v. City Council (CALM), 2006 MT 47; 331 Mont. 269; 130 P.3d 1259; 2006 Mont. LEXIS 59; and Ash Grove Cement Co. v. Jefferson County, 283 Mont. 486; 943 P.2d 85; 1997 Mont. LEXIS 155; (1997). Here in both instances the general land uses for

these properties proposed for rezoning existed as light commercial land uses for more than five decades, more than 50 years.

A 2004 zoning compliance permit authorized a professional office use at 620 Addison.

ISSUES:

1. May "spot" or "island" zoning be legal?

2. Generally what are the primary factors to consider when attempting to review the legality or illegality of "spot" or "island" zoning?

CONCLUSIONS:

1. Yes. "Spot" or "island" zoning may be justified and may be legal. Reasonable basis for the "spot" or "island" zoning is reviewed upon its own facts and circumstances.

2. A zoning change is not invalid merely because only one or two parcels of land or one or two properties are involved. Spot zoning practices may be valid or invalid depending upon the facts of the specific case.

LEGAL DISCUSSION:

Purported spot zoning is not necessarily illegal simply because someone alleges it is spot zoning. In Little v. Board of County Comm'rs the Montana Supreme Court identified three factors that enter into a determination of whether illegal spot zoning exists in any zoning action. All three of these factors must exist for the "spot" or "island" zoning to constitute unlawful spot zoning:

> (1) the proposed use is significantly different from the prevailing use in the area;
>
> (2) the area in which the requested use is to apply is rather small from the perspective of concern with the number of separate landowners benefited from the proposed change;
>
> (3) the change is special legislation designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little v. Board of County Comm'rs, 193 Mont. 334; 631 P.2d 1282; 1981 Mont. LEXIS 784 (1981)

The Court went on in Little to note a qualification that if spot zoning is invalid usually all three of the above mentioned elements are present.

In several subsequent decisions the Montana Supreme Court continued to rely on the three factors as the review criteria for determination of validity of spot zoning. Several subsequent decisions have found specific spot zoning to be legal.

1. Boland v. City of Great Falls, 275 Mont. 128; 910 P.2d 890; 1996 Mont. LEXIS 17; (1996), the Supreme Court held that no illegal spot zoning occurred and indicated that the zoning change would benefit the adjacent property owners whose property values would tend to increase from the project development; and that there would be benefit to more landowners than the individuals whose property was being zoned and therefore the zoning was not in the nature of special legislation designed to benefit only one landowner;

2. Citizen Advocates for a Livable Missoula, Inc. v. City Council (CALM), 2006 MT 47; 331 Mont. 269; 130 P.3d 1259; 2006 Mont. LEXIS 59, Broadway-Scott Gateway Special District rezoning proposal for West Broadway Safeway did not constitute illegal spot zoning, the benefit was not conferred at the expense of the general public;

3. North 93 Neighbors, Inc. v. Bd. of County Comm'rs, 2006 MT 132; 332 Mont. 327; 137 P.3d 557; 2006 Mont. LEXIS 228, despite Wolford's sole ownership of the parcel, county commissioners did not enact zoning amendment at expense of surrounding land owners or the general public; and

4. Lake County First v. Polson City Council, 2009 MT 322; Mont. 489; 218 P.3d 816; 2009 Mont. LEXIS 470, Wal-mart annexation and zoning from low density residential to a heavy highway commercial zoning district not illegal spot zoning because Supreme Court "cannot conclude that the benefit is inappropriately conferred at the expense of the general public."

Charles S. Rhyne in *The Law of Local Government Operations,* at 761, explains:

> However, a zoning change is not invalid merely because only one parcel of land or only one owner is involved. While the size of the parcel involved is important, the validity or invalidity of alleged "spot zoning" depends upon more than the size of the parcel, and while spot zoning is not looked upon with favor, it is not necessarily illegal. "Spot zoning" is a descriptive term and not a term of art, the validity or invalidity depending upon the facts and circumstances involved. (Emphasis added.)

McQuillan, *Municipal Corporations*, 3rd Edition Revised, Vol. 8, § 25.90, provides:

> **§25.90. - Valid "spot" zoning.**
>
> "Island" or "spot" zoning may be justified where it is germane to an object within the police power, and no hard and fast rule that such zoning is illegal can be announced. The matter involved is essentially legislative in character and the determination made concerning it may be attacked in the courts only if it is without a reasonable basis. When "spot" zoning is permitted in any district, the

legislative body must determine where the boundary is to be placed, attempting as far as possible to minimize resulting inconveniences. Moreover, it is largely within the discretion of the legislative body of a city to determine whether a proper use "island" in a district restricted to other uses should be enlarged.

As previously stated, spot zoning is not per se illegal, but rather illegal only if lacking a reasonable basis. Although there may be an absence of a presumption as to the validity of such spot zoning, it may constitute a valid exercise of the zoning power when there is a substantial change of conditions in an area or where the original zoning was erroneous. Indeed, to permit particular uses in a small area within a larger area devoted to other uses well may fall within the scope of a zoning law requiring a comprehensive plan made with a reasonable consideration of the character of the district, its peculiar suitability and particular uses, conservation of values and the most appropriate use of the land. Thus, the validity of "spot" or "island" zoning depends upon more than the size of the "spot" or the fact that it is surrounded by uses of another character than those for which the "spot" is zoned. In other words, there are exceptional cases in which "island" or "spot" zoning is a valid exercise of the police power; the decision in each case turns upon its own facts and circumstances. (Emphasis added.)

Earlier in § 25.89, *McQuillin*, provides: "The burden of demonstrating that a particular zoning amendment is illegal "spot zoning" rests with the party attacking the ordinance." (Emphasis added.)

In Little the Montana Supreme Court stated:

There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance. First, in spot zoning, the requested use is significantly different from the prevailing use in the area. Second, the area in which the requested use is to apply is rather small. This test, however, is concerned more with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited. Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public. See, Williams, 1 American Land Planning Law, at 563; Hagman, Urban Planning and Land Development Control Law (1971), at 169; Rhyne, The Law of Local Government Operations (1980), at 760-761.

In explaining the third test, Hagman gives this qualification:

"The list is not meant to suggest that the three tests are mutually exclusive. If spot zoning is invalid, usually all three elements are present, or, said another way, the three statements may merely be nuances of one another." Hagman at 169.

This qualification must be heeded because any definition of spot zoning must be flexible enough to cover the constantly changing circumstances under which the test may be applied. . . .

Rather, it is really a question of preferential treatment for one or two persons as against the general public, regardless of the size of the tract involved. (Emphasis added.)

Little v. Board of County Comm'rs, 193 Mont. 334; 631 P.2d 1282; 1981 Mont. LEXIS 784 (1981)

Later in Boland the Montana Supreme Court analyzed Little and spot zoning and concluded no illegal spot zoning occurred in the Great Falls case explaining:

In Little v. Board of County Commissioners of Flathead County (1981), 193 Mont. 334, 631 P.2d 1282, we identified the following three factors that are generally present when illegal spot zoning occurs, which we restate as follows:

1. The requested use is significantly different from the prevailing use in the area.

2. The area in which the requested use is to apply is rather small, however, this factor is more concerned with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited.

3. The requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little, 631 P.2d at 1289. We noted that the three factors are not mutually exclusive and cautioned that any definition of spot zoning must be flexible enough to cover the constantly changing circumstances under which the test may be applied. Little, 631 P.2d at 1289. . . .

While the maximum density level will be twenty-nine percent higher than if the Property were developed solely as single family detached residences, it is important to note that the "A" residence zone permits "town-houses" as a conditional use.

We conclude that the proposed condominium project is essentially residential in nature and not significantly different from the prevailing use in the area. Therefore, the first prong of the Little test is not satisfied.

Having made that determination, we now must determine whether it is necessary to proceed to the final two elements of the Little test. In explaining the test, we stated that "[i]f spot zoning is invalid, usually all three elements are present or, said another way, the three statements may merely be nuances of one another." Little, 631 P.2d at 1289 (citing Hagman, Urban Planning and Land Development Control Law (1971) at 169). Since we held in Little that "usually" all three elements are required to establish illegal spot zoning, it is possible illegal spot zoning can occur in the absence of an element. . . .

The second and third elements of the Little test must be analyzed together. The number of separate landowners affected by the rezoning relates directly to whether or not the rezoning constitutes special legislation in favor of only one person. Since none of the surrounding landowners have been granted permission to build condominiums on their property, plaintiffs argue that rezoning the

> Property benefits only the condominium developer. We determine that the plaintiffs' viewpoint is too narrow in its scope.
>
> We agree with the plaintiffs that the primary focus of the second and third Little factors is not the benefit resulting from the development of the Property, but rather the benefit to landowners as a result of the rezoning. However, we disagree with plaintiffs' contention that only the condominium developer will benefit as a landowner from the zoning change.
>
> Our review of the record indicates that the orphanage was razed on or about March 1983. After the building was razed, the Property was placed for sale and for approximately seven years prior to the proposed development the Sisters had received no serious offers to purchase the land. The Property has deteriorated over the years to the extent that it now contains a variety of nuisances and eyesores, including broken glass, animal excrement, noxious weeds, unkempt and dead vegetation, unfilled basements, and abandoned boilers. The City offered testimony that the zoning change would increase the value and salability of the surrounding property by eliminating the existing blight resulting from the nonuse of the lots and by eliminating the uncertainty of the future use of the Property, thereby benefiting the surrounding neighborhood. We therefore agree with the District Court which found that the zoning change would benefit the adjacent property owners whose property values would tend to increase from the project development. Thus, rezoning the Property will directly benefit more landowners than merely the individual developer. We therefore conclude the zoning change is not in the nature of special legislation designed to benefit only one landowner. (Emphasis added.)

Boland v. City of Great Falls, 275 Mont. 128; 910 P.2d 890; 1996 Mont. LEXIS 17; (1996)

Later the Montana Supreme Court in CALM held that no illegal spot zoning occurred stating:

> Here, the zoning proposal and proposed Safeway facility are not significantly different from prior uses and zoning within the 800 and 900 blocks of the West Broadway community. Similar to the former zoning classifications of C (Commercial), RH (High Rise), and P-2 (Public Lands and Institutions), the current zoning proposal continues to provide for a mixed use of residential and business uses. Furthermore, the Planning Board noted that other "big box" grocery stores have historically used the area, specifically " the Big Broadway," illustrating that the proposed Safeway is not " significantly different" from past uses.
>
> Finally, while the zoning proposal certainly benefits Safeway and SPH, we cannot conclude that the benefit is conferred at the expense of the general public. To the contrary, as a matter of adopted policy under the neighborhood plans, the health of Safeway and SPH is deemed to be in the public's interest. For that reason, and for the others listed above, we agree with the District Court that the zoning proposal does not constitute illegal spot zoning. (Emphasis added.)

Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, ¶33 ¶34; 331 Mont. 269; 130 P.3d 1259; 2006 Mont. LEXIS 59.

Later in 2006, the Montana Supreme Court concluded that there was no illegal spot in North 93 Neighbors zoning concluding its analysis stating that:

> We therefore conclude that despite Wolford's sole ownership of the parcel, the Board did not enact the Zoning Amendment at the expense of surrounding landowners or the general public. (Emphasis added.)

North 93 Neighbors, Inc. v. Bd. of County Comm'rs, 2006 MT 132 ¶70; 332 Mont. 327; 137 P.3d 557; 2006 Mont. LEXIS 228.

It should also be noted that the Montana Supreme Court found illegal spot zoning with respect to a 323 acre PUD zoning proposal near Yellowstone Park in a Hebgen Lake zoning district proposing a golf course, 10 acres of commercial land, 11 acres of multi-family and 65 acres of single family residential. The proposed zoning changes conflicted with prevailing land use in the area at the expense of the general public and surrounding land uses. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs, 2001 MT 99; 305 Mont. 232; 25 P.3d 168; 2001 Mont. LEXIS 119. A similar conclusion was reached for a 668 acre rezoning of agricultural land to heavy industrial to allow for construction of a power plant which was out of character with existing agricultural land uses in the vicinity. Plains Grains L.P. v. Bd. of County Comm'rs, 2010 MT 155; 357 Mont. 61; 238 P.3d 332; 2010 Mont. LEXIS 238.

83 Am.Jur.2d, Zoning and Planning, § 146, cites in abbreviated form these three factors from the Little decision.

> **§ 146. Generally.**
>
> Definition: "Spot zoning" is a descriptive term rather than a legal term of art, and spot zoning practices may be valid or invalid depending on the facts of the particular case.
>
> . . . .
>
> Central to the analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land, as where a zoning amendment attempts to wrench a single small lot from its environment and give it a new rating which disturbs the tenor of the neighborhood. The determination also requires consideration of whether the proposed "spot" is inherently distinguishable from other property in the district. Thus, spot zoning occurs where a small parcel is singled out and given lesser or greater rights than the surrounding property for a reason that cannot be justified on the basis of the health, safety, morals, or general welfare of the community, as where a lot in the center of a business or commercial district is limited to use for residential purposes thereby creating an "island" in the middle of a larger area devoted to other uses.
>
> Observation: Three factors need be considered when determining whether spot zoning exists: first, the requested use is significantly different from the

prevailing use in the area; second, the area in which the requested use is to apply is small; and third, the requested change is more in the nature of special legislation. (Emphasis added.)

The footnote for this observation cites as authority the Montana Supreme Court decision in Little.

Rathkopf, *The Law of Zoning and Planning*, Vol. 3, §§ 41:2, 41-3 and 41-4 provides:

> NIMBY lawsuits that challenge the validity of a specific rezoning based on an illegal spot zoning claim usually prove unsuccessful. Today, courts generally hold that the "spot zoning" of an individual tract or relatively small parcel of land is not per se invalid. (Emphasis added.)

Rathkopf, Vol. 3, § 41:5 indicates that zoning amendments are often upheld if they promote the general welfare. Rathkopf goes on at 41-29 to state:

> Where the interest of the general community and the immediate neighborhood do coalesce, the rezoning of a small parcel is even more likely to be upheld.
>
> Courts have also held that small-parcel rezoning of a small parcel is even more likely to be upheld.
>
> Courts have also held that small parcel rezoning to permit the continuation of a destroyed or previously abandoned nonconforming use is valid if necessary to prevent deterioration of the property and depreciation of neighboring property values. (Emphasis added.)

83 Am.Jur.2d, *Zoning and Planning*, § 149, discusses the public good or benefit test providing:

> **§149. Benefit or detriment to public test.**
>
> What appears to be spot zoning may be legal where the rezoning is for the public good. On the other hand, where a zoning ordinance which rezones a parcel of land is shown to be unreasonable and unrelated to the public health, safety, or welfare, it constitutes invalid spot zoning. Thus, a relevant consideration in determining whether purported spot zoning is valid is whether the ordinance or proposed amendment provides a public benefit.
>
> In order to have property rezoned, the person seeking the change may be required to establish that there is a public need for the proposed use of the property. The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic, and political unit. If the legislative purpose is to further the welfare of the county or city as part of its overall zoning plan, the ordinance will not be spot zoning even though private interests are simultaneously served. (Emphasis added.)

CONCLUSIONS:

1. Yes. "Spot" or "island" zoning may be justified and may be legal. Reasonable basis for the "spot" or "island" zoning is reviewed upon its own facts and circumstances.

2. A zoning change is not invalid merely because only one or two parcels of land or one or two properties are involved. Spot zoning practices may be valid or invalid depending upon the facts of the specific case.

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/s/

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