OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2011-004

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Mike Barton; OPG Director; Janet Rhoades, OPG; Denise Alexander, OPG; Mary McCrea, OPG; Laval Means, OPG; Tom Zavitz, OPG; Jen Gress, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk's Office; Ellen Buchanan, MRA; Chris Behan, MRA; Donna Gaukler, Parks & Rec Director; Jackie Corday, Parks & Rec

CC: Legal Staff

FROM: Jim Nugent

DATE: February 11, 2011

RE: Guided Tours to Advisory Board Members or City Elected Officials by opponents to Rezoning Violates Appearance of Fairness Doctrine with Respect to Land Use decision Making

---

FACTS:

Recently with respect to a proposed rezoning request opponents to the proposed rezoning were attempting to influence advisory city/county planning board/zoning commission members by offering guided tours of the lands proposed for rezoning. Pursuant to Montana's public meeting, public right to know, and public participation laws, as well as the appearance of fairness legal principle it is legally inappropriate for any proponent or opponent to attempt to ex parte provide land use decision makers with a guided tour of lands to be rezoned.

ISSUE(S):

Should land use board members and city elected officials who are responsible for making land use decisions such as zoning, rezoning, subdivision, etc., avoid efforts of opponents or proponents to influence their decision making outside of public meetings or public record communications?

CONCLUSION(S):

Yes, land use board members and city elected officials responsible for making land use decisions such as zoning, rezoning, or subdivision land use decisions should avoid pre City Council public hearing conduct that evidences bias or prejudice in favor of or against a specific land use, zoning or subdivision application. Land use board members and city elected officials responsible for making land use decisions such as zoning, rezoning, or subdivision should also avoid any non-public meeting or non-public record communications pertaining to any upcoming land use decision that will be within their jurisdiction to determine.

LEGAL DISCUSSION:

It is legally inappropriate for local government planning board members or city elected officials who have authority to review, recommend, or determine land use applications such as zoning, rezoning, or subdivision to engage in any conduct or communication in a non-public meeting and/or non-public record setting with respect to land use zoning, rezoning, or subdivision matters. Planning board and city elected officials serving as land use decision makers must avoid weakening public confidence or undermining a sense of security of individual property owner rights. These local government officials must provide an impartial, fair public process with respect to land use decision making for specific subdivision, zoning, and rezoning applications.

An appearance of fairness doctrine and procedural due process standard should be present for specific land use zoning, rezoning, and/or subdivision application decision making to ensure unbiased decision making. Such appearance of fairness decision making is undermined by any advisory city planning board members or elected officials actions or conduct indicating pre-decision-making bias or prejudice. Evidence of pre-decision-making bias or prejudice by a City Council member/Mayor could disqualify the city elected official and/or invalidate the land use decision made by the City Council and/or Mayor.

Individual decision makers on site inspections of pending land use proposals are a challenge that provides an added responsibility for the decision maker to place in the public record any aspect of the onsite inspection that might influence their decision making. However, one sided onsite tours or inspections provided by opponents and/or proponents to decision makers are legally inappropriate pursuant to Montana's public meeting and public record decision making process as well as violate the appearance of fairness legal principles.

Ensuring procedural fairness requires land use decision makers to enter into the record any significant aspect of an individual on-site inspection that might influence their decision making. The New Jersey Superior Court in Smith v. Fair Haven Zoning Board of Adjustment, 761 A.2d 111 (N.J. 2000) stated the following with respect to a land use decision making body's on-site inspection with respect to a matter pending before a zoning board of adjustment.

We have stated that "a board may and indeed is expected to bring to bear in its deliberations the general knowledge of the local conditions and experiences of its individual members." Baghdikian v. Board of Adjustment, Borough of Ramsey, 247 N.J. Super. 45, 50, 588 A.2d 846 (App. Div. 1991); see also Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 284, 212 A.2d 153 (1965). In addition to reliance on personal knowledge, site inspection by zoning board members has been approved by our Supreme Court. Giordano v. City Comm'n of City of Newark, 2 N.J. 585, 588, 67 A.2d 454 (1949). In view of its flexible role, "it makes good sense not to straightjacket a board of adjustment with all of the rigid procedural standards imposed upon trial judges." Baghdikian v. Board of Adjustment, Borough of Ramsey, 247 N.J. Super. at 50. Nevertheless, "the knowledge gained from a site inspection must be placed on the record so that the essence of a fair hearing is provided and a full reviewable record is made." Baghdikian, 247 N.J. Super. at 51 (citing Giordano v. City Comm'n of City of Newark, 2 N.J. at 588-89; Peoples Trust Co. of Bergen County v. Board of Adjustment of Hasbrouck Heights, 60 N.J. Super. 569, 575, 160 A.2d 63 (App. Div. 1959)). Although counsel and opposing parties need not be present during the site inspection, "it is preferable that prior notice be given at the hearing to afford the applicant and interested parties an opportunity to prepare a response to the knowledge gained by the board member as a result" of his or her visit to the property. Baghdikian, 247 N.J. Super. at 52. 588 A.2d 846.

In Schalow vs. Waupaca County, 407 N.W.2d 316, 139 Wisconsin 2d 284 (Wis. App. 1986), the Wisconsin Court of Appeals held it would be a denial of a zoning variance applicants' right to procedural due process for the zoning board of adjustment to base their decision upon a hidden reason which the applicants for the variance had no opportunity to rebut. In the Schalow case, the zoning variance applicants were denied their application for a variance request in which they sought a variance from the lot size and setback requirements of the county zoning ordinance to construct a single family dwelling on their vacant lot. The board made an on site inspection and determined that the vegetation on the lot indicated a low area. However, no testimony to this effect was presented at the hearing nor was there testimony as to whether building on the lot would violate flood plain or shore land zoning regulations or have undesirable environmental consequences. The Schalow court stated supra, at 319, as follows:

. . . it would be a denial of the Schalow's right to procedural due process to base a decision upon a hidden reason which they had no opportunity to rebut. 4 Anderson, supra, sec. 22.38, p. 104; Hot Shoppes, Inc. vs. Clouser, 231 F.Supp. 825, 832-33 (D.D.C. 1964 aff'd. 346 F.2d 834 (D.C.Cir. l965). In this respect the board acted contrary to law. (emphasis added)

Rathkopf's "The Law of Zoning and Planning" Ziegler, Volume 2, §32.18, page 32-60 provides:

"§32:18 Disqualifying prejudgment bias

> Appearance of fairness doctrines and the special due process standards governing adjudicatory zoning action often are held to require an unbiased decisionmaker. Impartiality in the form of prejudgment bias undermines the basic due process right to a fair hearing. In adjudicatory and quasi-judicial proceedings, a zoning decisionmaker, whether elected or appointed, functions in a role analogous to that of a judge who is required to fairly hear and weigh the evidence received and to objectively apply established standards for decision to the facts of the case."

Rathkopf indicates that courts focus their concern on factual circumstances involving evidence of actual prejudgment of the specific facts presented by the specific land use review. Rathkopf indicates at page 32-62 that a court's attention will focus "on the ultimate due process, standard, of whether zoning applicant has been denied a 'fair hearing' due to the 'prejudgment bias' of a decisionmaker who has closed his mind to fairly weighing the evidence."

Footnote 11 on page 32-63 identifies the following court cases from other states where a court had held that the "closed mind" of a zoning decisionmaker was evident during the course of the land use proceedings:

> Winslow v. Town of Holderness Planning Bd., 125 N.H. 262, 480A.2d 114 (1984), wherein the court invalidated a zoning board's decision to waive subdivision regulations and grant subdivision approval where one of the board members who voted for approval had spoken in favor of the proposal at a public hearing before he became a board member. The court ruled that the board member had prejudiced the issue and should have disqualified himself. When a board member improperly fails to disqualify himself, the act of the board must be invalidated, because it is impossible to gauge the effect that member may have had on his colleagues.
>
> Hornbury Tp. Bd. Of Sup'rs. v. W.D.D., Inc., 119 Pa. Commw. 74, 546 A.2d 1328 (1985) wherein the court held that the refusal of town supervisor to abstain from voting on approval of developer's application for variances when supervisor appeared before zoning hearing board with counsel to oppose variances was improper because of supervisor's bias.
>
> McVay v. Zoning Hearing Bd. Of New Bethlehem Borough, 91 Pa. Commw. 287, 496 A.2d 1328 (1985), wherein the court held that the developer was denied due process when majority of members of zoning board who were appointed to consider conditional use permit for low income planned residential development had signed a petition opposing the original rezoning for the development.
>
> Marris v. City of Cedarburg, 176 Wis. 2d 14, 498 N.W.2d 842 (1993) (chairperson's comments created an impermissibly high risk of bias). (Emphasis added.)

Rathkopf "The Law of Zoning and Planning" Ziegler states in Section 32.19, page 32-66 and 32-67:

§32:19 Prejudice or partiality – Generally

"State court "appearance of fairness" doctrines and the special due process standards governing adjudicatory zoning action have been held to requrie disqualification of a decisionmaker where prejudice or partiality in regard to a zoning application is found to exist. Disqualifying prejudice or partiality has been found to exist on the basis of family or employment relationships or other associational ties. Also, prejudice has been found where a person who possesses the power of appointment over members of a zoning board appears before that board on behalf of or in opposition to an applicant. …

Where disqualifying prejudice or partiality is alleged, courts in many cases have noted that the relationship in question need not be shown to have actually tainted or influenced the decision. In a number of cases courts have stated that the test is whether a decisionmaker's personal interest stemming from the relationship might reasonably conflict with his official duty to decide impartially and thus weaken public confidence in the proper exercise of the zoning power." (Emphasis added.)

Rathkopf's "The Law of Zoning and Planning" Ziegler addresses remedies and sanctions §32.28, pages 32-88 and 32-89 in part as follows:

§32:28 Remedies and sanctions

"If a conflict or fairness violation is proved by opponents on appeal; the usual judicial remedy will be invalidation of the challenged zoning decision and remand for reconsideration, sometimes with procedures or terms of participation specified which will insure fairness, e.g., prohibiting the participation of conflicted members. In some cases, the prejudicial and determinative effect of a conflict of interest will be clear: as where, for example, a conflicted board member casts the deciding vote in granting or denying an approval. On the other hand, the taint is less clear where the conflicted member's vote was not necessary to the board's approval or denial, or where the approval involved is only preliminary or advisory. Yet further subtle questions as to the presence or absence of tainting effect can arise where the conflicted member has, for example, participated in a debate but refrained from voting.

Some state courts take the approach that participation in deliberation and/or voting by a member who should have been disqualified vitiates the entire proceeding, even though votes of other members would have sustained the result. This approach is usually premised on the theory that one member's self-interest may effect or influence the votes of other board members. Other courts have upheld board action, regardless of a tainted member's participation, so long as there was the required number of votes without counting the vote of the disqualified member. (Emphasis added.)

Madison River R.V. LTD v. Town of Ennis, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098, 2000 Mont. LEXIS 13 involved an assertion that a town council member had a closed mind with respect to land use proposal pending before the Ennis Town Council. The Montana Supreme Court stated in paragraphs 15-18 of its decision:

> To prevail on a claim of prejudice or bias against an administrative decision maker, a petitioner must show that the decision maker had an "irrevocably closed" mind on the subject under investigation or adjudication. **See Federal Trade Commission v. Cement Institute** (1948), 333 U.S. 683, 701, 92 L. Ed. 1010, 1034, 68 S. Ct. 793, 803. In **FTC**, the Court upheld a ruling that members of the Federal Trade Commission, who entertained views as a result of their prior ex parte investigations that a cement pricing system was the equivalent of price fixing in violation of the Sherman Act, were not thereby disqualified from presiding in an unfair trade proceeding concerning the cement pricing system.
>
> Here, the District Court thoroughly reviewed the transcript of the hearings before the Planning Board and determined that nothing Kensinger said indicated that his mind was irrevocably closed on the subject of the proposed subdivision. The court noted that at the first Planning Board meeting, Kensinger stated he had "uncertainties" about the project. He "questioned" whether the Town sewer system could support the proposed 73-vehicle recreational vehicle park, whether the developer would pay for problems he guaranteed would never occur, and whether the subdivision could ultimately result in a higher tax burden for the people of Ennis. The District Court stated, "While Commissioner Kensinger did express doubts about the subdivision's effects on Ennis, these expressions of uncertainty are evidence that his mind was anything but irrevocably made up on the subject."
>
> R.V. also claims that Kensinger may have had a financial interest in the denial of its application. It has attached to its brief a copy of a letter from a Bozeman, Montana, attorney addressed to its own attorney. The letter stated that the Bozeman attorney had been retained by "a group of individuals who are interested in making an offer to purchase the river property," and inquired as to R.V.'s interest in such an offer. A handwritten note at the bottom indicated that a copy of the letter had been sent to Kensinger. However, the writer of the handwritten note is not identified and nothing in the letter or the handwritten note states or implies that Kensinger is a member of the group interested in purchasing the property. Thus, R.V. has not supported its contention that Kensinger had a financial interest in the denial of its application.
>
> We agree with the District Court that Kensinger's statements do not indicate that he had an irrevocably closed mind on the subject of the park application. R.V. has not established in any other way that Kensinger had an irrevocably closed mind on the subject. We affirm the District Court's determination that the Town Council was not required to disqualify Kensinger from voting and the court's

decision not to vacate the Town Council's decision because of its failure to disqualify Kensinger. (Emphasis added.)

There was no evidence in the public record that the town council member had previously taken a position either for or against, thereby indicating a closed mind. In the specific factual circumstances in Madison River R.V. LTD v. Town of Ennis, Plaintiff did not adequately establish the town council member had a closed mind. Therefore, the courts would not disqualify the town council member from voting, nor would the courts invalidate the town council's decision.

CONCLUSION(S):

Yes, land use board members and city elected officials responsible for making land use decisions such as zoning, rezoning, or subdivision land use decisions should avoid pre City Council public hearing conduct that evidences bias or prejudice in favor of or against a specific land use, zoning or subdivision application. Land use board members and city elected officials responsible for making land use decisions such as zoning, rezoning, or subdivision should also avoid any non-public meeting or non-public record communications pertaining to any upcoming land use decision that will be within their jurisdiction to determine.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:wc