

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2010-011

**TO:** John Engen, Mayor; City Council; Bruce Bender; Mike Barton; Janet Rhoades; Mary McCrea; Denise Alexander; Laval Means

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** June 1, 2011

**RE:** Rule of separable change with respect to municipal zoning protests requires separate protest areas for areas with separate zoning classifications.

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### **FACTS:**

A current rezoning request for 1500 39<sup>th</sup> St. involves rezoning property from zoning classifications RM1-35 and RT2.7 to B1-1 and RM1.5. The current separate zoning classifications will not have the same boundaries pursuant to the proposed zoning classifications.

### **ISSUES:**

If a current rezoning request involves rezoning property from multiple, current zoning classifications to multiple proposed zoning classifications, how should zoning protests be calculated with respect to separable changes and separable districts?

### **CONCLUSION:**

Pursuant to the rule of separable change, Montana Attorney General Mike Greely held that a rezoning proposal that entails separable zoning classification changes in separate zoning classification districts must be considered as a series of rezoning proposals for the purpose of mapping the protest areas and determining the city council voting requirements, 37 Op. Atty Gen 58 (1977).

### **LEGAL DISCUSSION:**

37 Montana Attorney General Opinion No. 58 (1977) was issued to the City of Missoula to address a proposal by a ward 3 city council member to rezone all of ward 3 R-II restricted residential, including commercial areas along Higgins Ave. and Orange St. Pursuant to the rule of separable change, Montana Attorney General Mike Greely held that contiguous portions of commercially zoned areas were entitled to a separate zoning protest distinct from the B residential zoned areas.

Current municipal zoning protest law, 76-2-305 MCA, entitled *Alteration of zoning regulations—protest* provides:

**76-2-305. Alteration of zoning regulations -- protest.** (1) A regulation, restriction, and boundary may be amended, supplemented, changed, modified, or repealed. The

provisions of [76-2-303](#) relative to public hearings and official notice apply equally to all changes or amendments.

(2) An amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city or town council or legislative body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of:

- (a) the area of the lots included in any proposed change; or
- (b) those lots 150 feet from a lot included in a proposed change. (emphasis added).

Pursuant to 76-2-305 MCA, there are 2 identifiable zoning protest areas: 1. the geographic area of the lots included in the proposed zoning change and 2. the geographic area that encompasses those lots 150 feet from a lot included in a proposed change.

Montana Attorney General Mike Greely, when discussing the rule of separable change, stated:

“The second consideration is statutory. Section 11-2702 creates districts as the basic zoning units. The interpretation of related zoning statutes must be consistent with this fundamental concept. See, State ex. Rel. Jones v. Giles, 168 Mont. 130, 134, 541 p.2d 355, 358 (1975).

The court in Rusnak addressed these interrelated concerns. A proposed comprehensive ordinance would have affected many lots of that township. In determining the quantum of property necessary for an effective protest under a statute similar to Section 11-2705, the court adopted the following rule:

[I]n computing the protest area the measure is not the land throughout an entire city or township but the area affected by any separable change. Not only must the areas affected by separable, but also the changes brought by the amendment must not be inseparably related to each other. They must be able to be considered separate sections separately enacted. Property not affected by a separable change should be excluded from the computation for there would be no reason for such owners to object.

Rusnak, 174 A.2d at 279.

The entire district rezoned to a different use classification was deemed the measure of protest. Id.

You present a fact situation wherein contiguous portions of commercial and B-residential districts were proposed to be rezoned to RII. Applying the rule of separable change enunciated above, separate protest areas would be determined for the commercial portion and the B residential portion. For purposes of determining protest areas and voting requirements, the council should consider the rezoning measure as entailing two separate proposals.” (emphasis added).

## **CONCLUSION:**

Pursuant to the rule of separable change, Montana Attorney General Mike Greely held that a rezoning proposal that entails separable zoning classification changes in separate zoning classification districts must be considered as a series of rezoning proposals for the purpose of mapping the protest areas and determining the city council voting requirements, 37 Op. Atty Gen 58 (1977).

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