

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2011-014

**TO:** John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Marty Rehbein, City Clerk; Mike Barton, OPG; Denise Alexander, OPG; Hillary Schoendorf, OPG; City Zoning Board of Adjustment Members; Dept. Atty.

**FROM:** Jim Nugent

**DATE** July 27, 2011

**RE:** Mayoral appointments to City Zoning Board of Adjustment

### **FACTS:**

An alternate to the city zoning board of adjustment is questioning the city's appointment process for mayoral appointment of regular city zoning board of adjustment members.

### **ISSUE(S):**

1. Pursuant to Montana state law or Missoula city ordinance is there any provision of law that provides for the automatic advancement of an alternate member of the city zoning board of adjustment to a vacant regular membership on the city zoning board of adjustment?
2. Pursuant to existing law, who makes the appointment of regular members to the city zoning board of adjustment?
3. May the city zoning board of adjustment pursuant to its bylaws legally establish an automatic succession of the city board of adjustment alternates to vacancies on the regular city board of adjustment membership?

### **CONCLUSION(S):**

1. No, there is no provision of either Montana state law or Missoula City ordinance that provides for the automatic advancement of an alternate city zoning board of adjustment member to a vacant regular city zoning board of adjustment member position.
2. Pursuant to section 76-2-322 MCA pertaining to municipal zoning board of adjustment membership and length of terms, the city council is to specify the number and terms of the board

of adjustment members. Pursuant to Missoula Municipal Code section 20.90.010 MMC pertaining to the city board of adjustment it is expressly stated that members of the city board of adjustment are appointed by the mayor with approval of the city council.

3. No. Pursuant to law it is the mayor who appoints each individual member of the regular membership of the city zoning board of adjustment subject to the approval of the city council. Any city zoning board of adjustment bylaw attempting to establish an automatic succession of an alternate board member to a regular board membership would be ultra vires or beyond the legal authority of the city zoning board of adjustment. The city zoning board of adjustment is unauthorized and it is beyond the scope of power allowed to the city zoning board of adjustment for the city zoning board of adjustment to attempt to adopt an automatic succession procedure for alternate city zoning board of adjustment members to automatically succeed to a vacant regular city zoning board of adjustment membership.

### **LEGAL DISCUSSION:**

There is no provision of Montana state law or Missoula city charter or Missoula city ordinance that provides for the automatic advancement of an alternate city zoning board of adjustment member to a vacant regular city zoning board of adjustment member position.

Pursuant to Article III entitled MAYOR of the City of Missoula charter, section 6 provides:

6. Appointments. The Mayor shall make, with the advice and consent of the City Council, all appointments to City boards, agencies, authorities and commissions created by the City Council, except those appointments the City Council reserves to itself, or those appointments reserved to the Mayor exclusively, or those otherwise designated by law.

This City of Missoula charter provision is also consistent with other provisions of Montana state law that provide that the mayor is the authority that appoints individuals to city boards. See for example subsections 7-3-203(11) and 7-4-4303(1) MCA. Pursuant to subsection 20.90.010(B)(2) Missoula Municipal Code (MMC) pertaining to the city zoning board of adjustment membership, it is stated “2. Members are appointed by the Mayor, with approval of the City Council.” Section 20.90.010 MMC provides in its entirety as follows:

### **20.90.010 Board of Adjustment**

#### **A. Authority**

A Board of Adjustment is established as authorized by §76-2-321 through §76-2-328, MCA. The Board of Adjustment is responsible for conducting public hearings and making decisions in accordance with the procedures of this zoning ordinance and state law.

#### **B. Membership**

1. The Board of Adjustment must consist of seven regular members and two alternate members, all of whom must reside in the city.

**2. Members are appointed by the Mayor, with approval of the City Council.**

**3.** Alternate members may vote only in the absence of a regular member. The alternates must be designated as alternate #1 and alternate #2. If both alternate members are present at the meeting and there is the need for only one alternate to participate in a vote, alternate #1 will be the first alternate to assume voting status. If two alternates are required alternate #2 will assume voting status. Alternate member #2 may also vote whenever alternate #1 is not available and the vote of an alternate is needed. When called upon, alternates will assume all of the rights and responsibilities of regular members.

**C. Terms**

Members of the Board of Adjustment serve terms of three years, and may be reappointed.

**D. Operation**

**1.** The Board of Adjustment must establish a regular meeting schedule and make the schedule available to the general public.

**2.** Special meetings may be called by the chairperson or by an affirmative vote of at least five members.

**3.** The zoning officer is responsible for announcing meetings of the Board of Adjustment.

**4.** The Board of Adjustment must adopt its own rules and bylaws, consistent with its powers and duties under the provisions of this zoning ordinance, the Municipal Code and state law. The zoning officer must file a copy of the bylaws in the Office of Planning and Grants.

(Emphasis added.)

There is no Missoula City ordinance provision in section 20.90.010 MMC that provides for city zoning board of adjustment alternates to automatically succeed to a vacant regular city zoning board of adjustment membership.

Note that pursuant to subsection 20.90.010(D)(4) MMC city zoning board of adjustment bylaws must be consistent with both city of Missoula zoning ordinances as well as Montana state law. Any city zoning board of adjustment bylaw that attempts to provide for an automatic succession for an alternate city zoning board of adjustment member to a vacant regular membership would be ultra vires and inconsistent with subsection 20.90.010(B)(2), the City of Missoula charter and the provisions of Montana state law pertaining to mayoral appointment powers. Black's Law Dictionary Eight Edition, defines "ultra vires" as meaning "unauthorized, beyond the scope of power allowed or granted by a corporate charter or by law". See page 1559.

**CONCLUSION(S):**

1. No, there is no provision of either Montana state law or Missoula City ordinance that provides for the automatic advancement of an alternate city zoning board of adjustment member to a vacant regular city zoning board of adjustment member position.
2. Pursuant to section 76-2-322 MCA pertaining to municipal zoning board of adjustment membership and length of terms, the city council is to specify the number and terms of the board of adjustment members. Pursuant to Missoula Municipal Code section 20.90.010 MMC pertaining to the city board of adjustment it is expressly stated that members of the city board of adjustment are appointed by the mayor with approval of the city council.
3. No. Pursuant to law it is the mayor who appoints each individual member of the regular membership of the city zoning board of adjustment subject to the approval of the city council. Any city zoning board of adjustment bylaw attempting to establish an automatic succession of an alternate board member to a regular board membership would be ultra vires or beyond the legal authority of the city zoning board of adjustment. The city zoning board of adjustment is unauthorized and it is beyond the scope of power allowed to the city zoning board of adjustment for the city zoning board of adjustment to attempt to adopt an automatic succession procedure for alternate city zoning board of adjustment members to automatically succeed to a vacant regular city zoning board of adjustment membership.

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Jim Nugent, City Attorney

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