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Legal Opinion 2012-004

TO: Mayor John Engen, City Council, Planning Board Members, Bruce Bender, Mike Barton, Denise Alexander, Laval Means, Mary McCrea, Steve King, Kevin Slovarp, Doug Waters, Jessica Miller, Donna Gaukler, Jason Diehl, Jeff Brandt, Mark Muir, Mike Brady

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE January 20, 2012

RE: General land use Planning Board advisory role to governing body through proposals, recommendations, and advice.

FACTS:

Office of Planning and Grants (OPG) staff inform our office that some City/County Planning Board member inquiries have arisen concerning the Planning Board's role, authority, and functions on advising the respective local governing bodies that the planning board serves. The purpose of land use planning boards is to serve the local governing body in an advisory capacity. The local governing bodies are comprised of elected officials. The land use Planning Board membership consists of citizens who have been appointed by the respective local government. Pursuant to Montana state law applicable to municipal zoning and major subdivision reviews, there is a process consisting of two public hearings. The City of Missoula has established this process by having one public hearing before the City/County Planning Board and the subsequent second public hearing before the City Council governing body.

It is common, especially in contested land use application cases, for the presentations and testimony at the second public hearing to include efforts of those appearing at the City Council public hearing to address or respond to testimony and/or Planning Board inquires. It is also common for the presentations and testimony at the second public hearing to address or respond to Planning Board advisory recommendations that occurred at the first public hearing before the City/County Planning Board. Sometimes the presentations at the second public hearing include some proposed revisions to the land use applicant's proposal. Thus, the second public hearing may include presentations, testimony, and/or proposed revisions that were not presented at the City/County Planning Board, or that are responding directly to the advisory recommendations of the Planning Board. It is also conceivable that sometimes the presentation at the second public

hearing causes a Planning Board advisory recommendation to no longer be applicable, or to be in need of revision if adopted.

Pursuant to 76-1-109 MCA, the respective local governing bodies are not bound by the recommendations of the city/county planning board.

ISSUE:

What is the Montana State Legislature's identified primary role for a land use planning board pursuant to title 76, chapter 1 MCA?

CONCLUSION:

Pursuant to title 76, chapter 1, MCA, the Montana State Legislature has identified the primary purpose of a land use planning board to be advisory to the local government governing body by making recommendations and proposals, and by providing advice to the respective local governing bodies that the planning board serves.

LEGAL DISCUSSION:

Title 76, chapter 1, MCA is entitled "Planning Boards." Pursuant to the statutory provisions of Montana planning board law set forth in title 76, chapter 1, there are more than a half dozen specific statutory provisions that identify that the purpose and/or role of a land use planning board is to serve in an advisory capacity, making recommendations to the respective governing body. Some specific language examples include the following words or phrases "advisory capacity," "may propose policies," "advise the governing body," "recommendations," "make recommendations," "advisory jurisdiction," and "recommend." This legal opinion highlights some of the most pertinent provisions of title 76, chapter 1 MCA pertaining to the land use planning board's advisory purpose and role to the local governments that the planning board serves.

76-1-101 MCA authorizes that a local government governing body "may create a planning board in order to promote the orderly development of its governmental units and its environs." 76-1-102 MCA states that the purpose of a planning board is "that the planning board shall serve in an advisory capacity to presently established boards and officials." Section 76-1-102 MCA provides the following.

76-1-102. Purpose. (1) It is the object of this chapter to encourage local units of government to improve the present health, safety, convenience, and welfare of their citizens and to plan for the future development of their communities to the end that highway systems be carefully planned; that new community centers grow only with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth; that residential areas provide healthy surroundings for family life; and that the growth of the community be commensurate with and promotive of the efficient and economical use of public funds.

(2) In accomplishing this objective, it is the intent of this chapter that the planning board shall serve in an advisory capacity to presently established boards and officials. (Emphasis added).

76-1-106 MCA, entitled “Role of Planning Board,” provides that the planning board “shall serve in an advisory capacity,” and may provide policies for the topics identified in 76-1-106(2) MCA. Section 76-1-106 MCA provides as follows.

76-1-106. Role of planning board. (1) To ensure the promotion of public health, safety, morals, convenience, or order or the general welfare and for the sake of efficiency and economy in the process of community development, if requested by the governing body, the planning board shall prepare a growth policy and shall serve in an advisory capacity to the local governing bodies establishing the planning board.

(2) The planning board may propose policies for:

- (a) subdivision plats;
- (b) the development of public ways, public places, public structures, and public and private utilities;
- (c) the issuance of improvement location permits on platted and unplatted lands; or
- (d) the laying out and development of public ways and services to platted and unplatted lands. (Emphasis added).

76-1-107 MCA is entitled “Role of Planning Board in Relation to Subdivisions and Plats.” This section provides that the respective local governing body “shall seek the advice” of the planning board, and also that planning board may delegate to staff “to advise the governing body on any or all proposed minor subdivisions.”

76-1-108 MCA authorizes a city council to in its discretion require the city-county planning board to function as the zoning commission.

76-1-109 MCA provides that the respective local government governing bodies “shall give consideration to recommendations of the city-county planning board, but the governing bodies shall not be bound by such recommendations.” (Emphasis added).

76-1-305 MCA pertains to the administration of a land use planning board, and provides in part that the planning board has the power and duty to “make recommendations and an annual report to any governing bodies represented on the planning board concerning the operation of the board and the status of planning within its jurisdiction.” (Emphasis added).

76-1-402 MCA pertains to funding of planning board operations, and provides that the governing bodies “may appropriate funds to carry out the duties of the planning board,” and that any funding may be a proportion of expenditures as agreed to be borne by each local government when there are multiple local governments served by the planning board.

76-1-502 MCA pertains to planning board jurisdictional areas, and provides for the filing of a map with the county clerk and recorder identifying “the area over which the planning board shall have advisory jurisdiction.” (Emphasis added).

76-1-603 MCA sets forth alternative recommendations that a planning board may make to a local government governing body concerning the adoption of a growth policy. This section provides as follows.

76-1-603. Adoption of growth policy by planning board. After consideration of the recommendations and suggestions elicited at the public hearing, the planning board shall by resolution:

- (1) recommend the proposed growth policy and any proposed ordinances and resolutions for its implementation to the governing bodies of the governmental units

represented on the planning board;

- (2) recommend that a growth policy not be adopted; or
- (3) recommend that the governing body take some other action related to preparation of a growth policy.

Finally, Montana's open space laws, pursuant to 76-6-206 MCA, provide that "all proposed conservation easements shall be subject to review and comment by the appropriate local planning authority, and any such comments will not be binding on the proposed grantor or grantee, but shall be merely advisory in nature." (Emphasis added).

CONCLUSION:

Pursuant to title 76, chapter 1, MCA, the Montana State Legislature has identified the primary purpose of a land use planning board to be advisory to the local government governing body by making recommendations and proposals, and by providing advice to the respective local governing bodies that the planning board serves.

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/s/

Jim Nugent, City Attorney

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