

OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2009-009

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Marty Rehbein, City Clerk; Roger Millar, OPG Director; Mike Barton, OPG; Tom Zavitz, OPG; Laval Means, OPG

FROM: Jim Nugent

DATE March 9, 2009

RE: City County Planning Board may serve as Advisory Zoning Commission

FACTS:

Some general issues have arisen with respect to the City County Planning Board's role as city zoning commission with respect to the Missoula City Zoning Ordinance update review that is occurring.

ISSUE(S):

- (1) May a City County Planning Board serve as a City Zoning Commission?
- (2) What is the City County Planning Board's role when serving as a City Zoning Commission?
- (3) What is the legal effect of City County Planning Board recommendations to the City Council?
- (4) Does Montana state law require a City Council to enter findings in support of its zoning decisions?

CONCLUSION(S):

- (1) Yes, §76-1-108 MCA expressly authorizes that city County Planning Board may serve as a Zoning Commission.
- (2) The City County Planning Board's role when serving as a City Zoning Commission is as an advisory body to make recommendations to the City Council. In practice the City County Planning Board relies on and utilizes the Office of Planning and Grants (OPG) staff to assist it with having a preliminary report available for a public hearing, conducting the

public hearing and forwarding its final report recommendations to the City Council prior to the City Council holding its public hearing.

(3) City County Planning Board recommendations are to be given consideration by the City Council, but the recommendations are not binding on the City Council.

(4) There is no statutory zoning law in Montana that requires a City Council to enter findings in support of its zoning or rezoning decisions.

LEGAL DISCUSSION:

Title 76, Chapter 1, Montana Code Annotated is entitled “Planning Boards” and Part 1 sets forth general provisions. Within Part 1, Section 76-1-108 MCA statutorily authorizes a city County Planning Board to serve as a City Zoning Commission. Section 76-1-108 provides:

76-1-108. City-county planning board as a zoning commission. The city council may in its discretion require the city-county planning board to function as the zoning commission authorized under 76-2-307. (Emphasis added.)

The Interlocal Agreement between the City of Missoula and the County of Missoula to cooperate in the provision of planning services and grants administration, states in Section 2(A)(3) through (7):

Section 2: The Missoula Consolidated Planning Board

The Missoula Consolidated Planning Board is retained as the advisory board to the governing bodies of the city and county. The jurisdictional area of the Board is the incorporated and unincorporated areas of Missoula County.

A. Authority. The Missoula Consolidated Planning Board is a consolidated planning board and shall have all rights, duties, powers and obligations for planning in the County and City of Missoula as provided by MCA 76-1-106 and 305, 401 and 402 or as otherwise authorized by this agreement, and as jointly or independently assigned by the County or City of Missoula pursuant to State enabling legislation. The Consolidated Planning Board shall have the following authority:

....

3. To receive staff support and legal assistance as determined by the governing bodies;

4. To advise the City and County on all matters relating to the adoption or amendment of a growth policy and any other planning documents designed to be a guide for the orderly development of the community and any other matter referred to it by the City Council or County Commissioners not inconsistent with this agreement or State law;

5. To advise the City and County on all ordinances and resolutions adopted for the purpose of regulating development as provided herein;

6. To constitute the City Zoning Commission and County Zoning Commission for the purposes of advising the City and County on zoning matters;

7. To advise the City and County on matters pertaining to the establishment or amendment of zoning and subdivision regulations to the City and County on all matters pertaining to zoning, rezoning and special zoning requests; district boundary changes; and subdivision plat review; and” (Emphasis added.)

Section 76-2-307 MCA pertaining to municipal zoning commissions provides that a zoning commission makes recommendations to the City Council. Section 76-2-307 MCA provides:

76-2-307. Zoning commission. In order to avail itself of the powers conferred by this part, except 76-2-306, the city or town council or other legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such city or town council or other legislative body shall not hold its public hearings or take action until it has received the final report of such commission. (Emphasis added.)

OPG staff assigned to the City County Planning Board prepare preliminary staff reports for the planning board prior to the public hearing, assist with conducting the public hearing and assist with providing the planning board's recommendations to the City Council as a final report after the City County Planning Board has made its recommendations to the City Council.

Section 76-1-109 MCA pertaining to the interaction of a local government with the City County Planning Board states:

76-1-109. Interaction of local government and city-county planning board. The governing bodies of the city or county shall give consideration to recommendations of the city-county planning board, but the governing bodies shall not be bound by such recommendations. (Emphasis added.)

There is no statutory zoning requirement in Montana Municipal Zoning Statutes that requires a city council to enter findings in support of its zoning decisions. Therefore, there is no requirement in Montana State law that requires that the advisory City County Planning Board enter any findings in support of its recommendations to the city council.

The Montana Supreme Court in Foster v. City of Bozeman, 189 Mont. 54, 71-72; 614 P.2d 1072, 1076; 1980 Mont. LEXIS 802 held that there was no duty of a city council to enter findings in support of a decision granting or denying a rezoning application, to keep a verbatim record of the proceedings, or to conduct its proceedings in an adjudicatory manner. The Montana Supreme Court in Foster stated supra at 71-72 that:

“.... There is neither existing statutory law nor Montana case law requiring this procedure, and it is difficult for us to determine that the City Commission nonetheless had a mandatory duty to keep such a record. The fact that Foster did have a record if he chose to use it, obviates any prejudice occurring because of an absence of a record. It is difficult for us to see how he could claim in District Court that review was inadequate because the city had not recorded the proceedings, but where he actually had his own record of the proceedings.

Nor is there any existing statutory or case law in this state which requires a City Commission when hearing a rezoning application, to enter findings in support of its decision. (Emphasis added.)

CONCLUSION(S):

(1) Yes, §76-1-108 MCA expressly authorizes that city County Planning Board may serve as a Zoning Commission.

(2) The City County Planning Board's role when serving as a City Zoning Commission is as an advisory body to make recommendations to the City Council. In practice the City County Planning Board relies on and utilizes the Office of Planning and Grants (OPG) staff to assist it with having a preliminary report available for a public hearing, conducting the public hearing and forwarding its final report recommendations to the City Council prior to the City Council holding its public hearing.

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Jim Nugent, City Attorney

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