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## Legal Opinion 2009-010

**TO:** John Engen, Mayor; City Council; Bruce Bender, CAO; Roger Millar, OPG Director; Mike Barton, OPG; Laval Means, OPG; Tom Zavitz, OPG; Denise Alexander, OPG; Mary McCrea, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer

**CC:** Dept. Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** March 10, 2009

**RE:** There is no Montana municipal zoning statute or supreme court case law requiring a city council issue written findings with respect to the purposes of zoning statute Mont. Code Ann. § 76-2-304

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**FACTS:**

The City of Missoula is currently engaged in a multi-year general review and update of its zoning regulations. Pursuant to this review the city has also engaged in an extensive public meeting, public education and consulting effort with a large citizen group selected by the Mayor and City Council members. Recently the City Council referred the general zoning update to the City County Planning Board to commence public hearings on the update.

During last week's City County Planning Board public hearing, some citizens asserted there must be a written analysis of Mont. Code Ann. § 76-2-304 purpose of zoning criteria performed with respect to revisions to the text of general zoning regulations in order for the city council to be able to adopt general zoning regulation revisions. These citizens attempt to rely on the 1974 Montana Supreme Court reversal of a Missoula City Council rezoning down zoning of 5.8 acres of land on southeast Waterworks Hill where the landowner was planning an apartment complex. See Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551, 1974 Mont. LEXIS 388 (1974). The Lowe decision pertained to a Supreme Court evidentiary analysis that there was a lack of evidence to support rezoning down zoning Waterworks Hill lands from a "B" residential to "RR-I" residential zoning district classification to prevent development of the apartment complex. After concluding there was a lack of evidence to support rezoning down zoning the Court concluded by emphasizing that rezoning down zoning decisions must be supported by actual evidence and not emotional citizen outbursts that are not evidence.

Mont. Code Ann. § 76-2-304 pertaining to the purposes of zoning identifies general zoning criteria to consider. In Lowe the Court noted each of the 12 criteria might not be applicable to every zoning decision and need not be considered if it is not applicable. Consideration of the statutory criteria set forth in §76-2-304; often will provide differing and varied perspectives and opinions as to whether one or more of the zoning criteria is applicable, relevant, or a potential material factor; and if it is a material factor to be weighed, whether it is adverse or supportive of the proposal. Reasonable people may have differing or varied perspectives and opinions with respect to both the interpretation and application of the zoning criteria to be considered. However, most notably, the Montana Supreme Court, six years after Lowe, in Foster stated there is no existing Montana municipal zoning statute or supreme court case law requiring a city council "when hearing a rezoning application, to enter findings in support of its decision." Foster v. Bozeman, 189 Mont. 64, 614 P.2d 1072, 1980 Mont. LEXIS 802 (1980).

**ISSUE:**

Do the statutory provisions of Mont. Code Ann. § 76-2-304, *Purposes of zoning*, require a city council to make written findings for each of the 12 zoning purpose criteria in order for the city council to make any zoning decisions?

**CONCLUSION(S):**

No, Mont. Code Ann. § 76-2-304 does not require a city council to make written findings with respect to each of the 12 zoning purpose criteria before the city council can make a zoning decision. Further, no other Montana municipal zoning statute requires the city council to make written findings. The Montana Supreme Court in Foster v. City of Bozeman stated that there was no Montana statute or Supreme Court case law that required a city council to enter written findings in support of its zoning decisions.

**LEGAL DISCUSSION:**

No Montana municipal zoning statutes or supreme court case law require a city council to issue written findings in support of a zoning decision, Foster, supra. Montana's municipal zoning statutes are primarily set forth in Title 76, chapter 2, parts 3, 4 and 9 Montana Code Annotated. Section 76-2-304 provides:

> **76-2-304. Purposes of zoning.** (1) Zoning regulations must be:
> (a) except as provided in subsection (3), made in accordance with a growth policy; and
> (b) designed to:
> (i) lessen congestion in the streets;
> (ii) secure safety from fire, panic, and other dangers;
> (iii) promote health and the general welfare;

(iv) provide adequate light and air;
(v) prevent the overcrowding of land;
(vi) avoid undue concentration of population; and
(vii) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.
(2) Zoning regulations must be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.
(3) Until October 1, 2006, zoning regulations may be adopted or revised in accordance with a master plan that was adopted pursuant to Title 76, chapter 1, before October 1, 1999.

There is no statutory provision in Mont. Code Ann. § 76-2-304 that requires a city council to issue written findings concerning the statutory purposes of zoning in support of its zoning decisions. Also, in Lowe the Court noted some statutory criteria might not be applicable and need not be considered with respect to some zoning decisions.

The Lowe decision involved certain property owners submitting a petition to the City of Missoula seeking to rezone and down zone a landowner's 5.8 acres of land on southeast Waterworks Hill from a "B" residential zoning district to a restrictive "RR-I" single family residence district. Lowe, 165 Mont. 38, 525 P.2d 551, 1974 Mont. LEXIS 388 (1974). The Lowe family had owned the 5.8 acres for approximately 40 years.

There were two legal issues before the Montana Supreme Court in Lowe:

1) Did the district court abuse its discretion in upholding the city council's approval of rezoning Ordinance No. 1549? and 2) Did the evidence before the district court support a court order upholding rezoning Ordinance No. 1549?

The court found that "there was such a mistake of fact that it amounted to an abuse of discretion on the part of the trial court requiring reversal."

In Lowe the attorney representing the Lowe family, whose 5.8 acres of land had been down zoned through rezoning, subdivided the municipal state law purposes of zoning statute text into 12 subsections as steps a city council was to follow when regulating land. He then argued that the testimony before both the city council and district court did not meet the statutory zoning criteria. The purposes of zoning statute tests for down zoning rezoning of Lowe's land identified by Lowe's attorney were:

1. Whether the new zoning was designed in accordance with the comprehensive plan.

2. Whether the new zoning was designed to lessen congestion in the streets.

3. Whether the new zoning will secure safety from fire, panic and other dangers.

4. Whether the new zoning will promote health and general welfare.

5. Whether the new zoning will provide adequate light and air.

6. Whether the new zoning will prevent the overcrowding of land.

7. Whether the new zoning will avoid undue concentration of population.

8. Whether the new zoning will facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.

9. Whether the new zoning gives reasonable consideration to the character of the district.

10. Whether the new zoning gives consideration to peculiar suitability of the property for particular uses.

11. Whether the new zoning was adopted with a view to conserving the value of buildings.

12. Whether the new zoning will encourage the most appropriate use of land throughout such municipality.

The Court focused on the evidence introduced at the city council and district court and stated "we note the record is so lacking in fact information that the action on the part of the city council and the district court could be said to have been based on mistakes of fact, thereby constituting an abuse of discretion." (Emphasis added.)

While it is important for potential court review of the city council's zoning decisions to establish an adequate record supporting city council zoning decisions; there is no requirement that the city council must issue written findings with respect to each of the zoning criteria in Mont. Code Ann. § 76-2-304.

The Lowe decision took the evidence introduced before the city council and district court and "weighed its merits" pursuant to the zoning criteria tests set forth in the purposes of zonings statute. (Emphasis added.) The Court found:

Test 1. Fails because the land is outside the area of the comprehensive plan, so could not be included.

Test 2. The testimony in regard to traffic clearly fails to indicate that the new zoning would lessen congestion or that the proposed complex would cause a mass dumping of traffic into the area.

Test 3. The evidence indicates the proposed rezoning is not necessary to protect adequate water, safety and fire protections for the area.

Test 4. It cannot be argued that the proposed rezoning would promote the health and welfare of the area. The health and welfare of the area would be promoted if a sewer were available and the new apartment complex plans to bring a sewer line to the complex, into an area where the homes are on septic tanks.

Test 5. The record lacks any evidence showing the proposed rezoning is necessary to protect adequate light and air.

Test 6. This test is whether the proposed rezoning will prevent the overcrowding of the land. Testimony indicated the city officials believed multiple dwelling complexes were permissible in the area and the city planner indicated if the density was reasonable the subject site would accommodate the complex. In view of the fact plaintiffs agreed to abide by density regulations, there can be no reason to rezone here to prevent land crowding.

Test 7. There was no evidence that the adoption of the rezoning would avoid an undue concentration of people in the area.

Test 8. The rezoning would in no way change or reduce the necessary public facilities, such as transportation, water, sewerage, schools, parks, etc. With respect to the objection made that the building of an apartment complex, as here proposed, would overtax the area's public facilities, we can only comment that progress and growth cannot be stopped by the lack of facilities. It is putting the cart before the horse to argue that because there are not enough facilities in a particular area it cannot grow.

Test 9. This test raises the question of whether the rezoning gives reasonable consideration to the character of the area. As of now the 5.8 acre tract has nothing on it but grass. The statute requires only that rezoning give consideration to the district, not the area. While there are single family residences in the district there are also many vacant areas plus areas that are zone "B residence". There was no showing that rezoning was necessary to protect the character of the district.

[Note this important legal distinction. Mont. Code Ann. § 76-2-304 pertaining to purposes of zoning specifies “character of the district” (zoning district) not the area.]

Test 10. Whether the rezoning gives consideration to peculiar suitability of the property for particular uses. The record indicates two architects, plus one of the plaintiffs -- a land planner by profession -- testified the 5.8 acre tract was suitable for an apartment complex.

Test 11. This test is whether the rezoning was adopted with a view to conserving the value of buildings. This is not applicable, nor need it be considered, due to the

> fact the land has no buildings. Further there is no testimony indicating that the single residence homes in the area would be damaged by the apartment complex.
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> Test 12. Will the new zoning encourage the most appropriate use of land throughout such municipality? This raises a policy question of whether the community needs an apartment complex at this particular site. If there is a need then error was made to rezone it into single residential homes. Evidence was introduced in the form of the "Mayor's Advisory Council on Housing Report" which indicated a continual growth in Missoula and a need to replace substandard units. The area in question is only a two minute drive and an eight minute walk from the heart of the central business district of Missoula. Viewing all of the testimony, we find that rezoning the area was an abuse of discretion. (Emphasis added.)

The city unsuccessfully argued that "one or more of the purposes of the enabling statute had been accomplished" thereby justifying the rezoning down zoning. Lowe, 165 Mont. 38, 42-43, 525 P.2d 551, 553-554 (1974).

In Lowe the Court also stated:

> This Court not only has authority to review the record made before the City Council plus the new testimony, but also has the responsibility to provide supervision in accord with established principles of practice. Where the information upon which the City Council and the district court acted is so lacking in fact and foundation, as heretofore noted, it is clearly a mistake of fact and constitutes an abuse of discretion. It is within the power of this Court to correct this mistake of fact by judicial review of the entire record.
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> This Court in Freeman v. Board of Adjustment, 97 Mont. 342, 355, 34 P.2d 534, 538, restricted zoning where it imposed unjust limitations on property and deprived the owner of his property rights. The Court held:
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> "Under the guise of protecting the public or advancing its interest, the state may not unduly interfere with private business or prohibit lawful occupations, or impose unreasonable or unnecessary restrictions upon them. Any law or regulation which imposes unjust limitations upon the full use and enjoyment of property, or destroys property value or use, deprives the owner of property rights." City of Jackson v. Bridges, 243 Miss. 646, 139 So.2d 660; Garner v. City of Carmi, 28 Ill.2d 560, 192 N.E.2d 816.

Lowe, 165 Mont. 38, 45-46, 525 P.2d 551, 555 (1974). (Emphasis added.)

The Court then focused on the importance of basing zoning decisions on actual evidence rather than emotional outbursts on the part of other individual homeowners stating:

> Considering the volatility of problems that arise under zoning ordinances and laws regulating the use of land, we note with approval the language of the federal district court of the District of Columbia, in American University v. Prentiss, 113 F. Supp. 389, 393, affd., 94 U.S.App.D.C. 204, 214 F.2d 282, 348 U.S. 898, 99 L.Ed. 705, 75 S.Ct. 217, wherein the court held:
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> "* * * Although possible impairment of property values seemed to be the main argument, very little actual evidence on the subject was produced. The testimony consisted chiefly of emotional outbursts on the part of individual homeowners, to the general effect that they had been informed by real estate experts that if the hospital were erected, the value of their property would decrease anywhere from thirty-five to fifty percent. Naturally such assertions are not evidence. * * *
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> "It is well established that administrative agencies are not required to apply the rules of law governing admissibility of evidence. These rules are binding only on judicial tribunals. Nevertheless, the probative weight of evidence is the same, irrespective of where the evidence is introduced, and must be tested by the same standards whether it is tendered to a court or to an administrative body."

Lowe, 165 Mont. 38, 45-46, 525 P.2d 551, 555 (1974). (Emphasis added.)

Black's Law Dictionary Eighth Edition by Garner at page 598 defines "probative evidence" as "evidence that tends to prove or disprove a point in issue." (Emphasis added.)

Subsequent Montana Supreme Court cases have referred to the purposes of zoning in Mont. Code Ann. § 76-2-304 as zoning criteria guidelines or objectives. In Schanz v. City of Billings, another rezoning down zoning case, developers purchased property to construct both single and multiple family dwellings. During construction they learned that they had to annex into the City of Billings in order to receive municipal water and sanitary sewer service. The city annexed the property but only zoned the property for single family dwellings. The developer had already commenced building some four-plexes. The developer unsuccessfully sought rezoning and a zoning variance. The developer then sued. The Supreme Court held that the City of Billings had to consider the 12 independent zoning factors criteria in the purpose of zoning statute prior to rezoning down zoning the property contrary to the county zoning relied on by the landowner when he commenced his development project. The city should not have rezoned down zoned the property it annexed without consideration of the zoning criteria. Schanz v. City of Billings, 182 Mont. 328, 597 P.2d 67, 1979 Mont. LEXIS 832 (1979).

In Schanz the Court indicated that the municipal purpose of zoning statute "sets forth guidelines a city council must follow in its regulation of land" and that the purpose of zoning statute existed prior to the decision in Lowe. The Court in Schanz sent the zoning change decision back to the district court to review the Billings City Council record in light of the statutory guidelines in the purpose of zoning statute.

In 1980, six years after the Lowe decision, in Foster the Court ruled that the district court could not require the City of Bozeman to make written findings with respect to its zoning

decisions. Foster involved a denial of a property owner zoning change request from agricultural – suburban zoning to a single family residential zoning classification. The Supreme Court in Foster stated:

> * * * 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.
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> 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.

Foster v. Bozeman, 189 Mont. 64, 614 P.2d 1072, 1980 Mont. LEXIS 802 (1980). (Emphasis added.)

The Montana Supreme Court in Little v. Bd. of County Comm'rs referred to the similar county purpose of zoning statute as "general objectives" of county zoning that must be considered citing the Lowe decision. Little v. Bd. of County Comm'rs, 193 Mont. 334, 631 P.2d 1282, 1981 Mont. LEXIS 784 (1981).

Later in Sutey Oil Co. Inc. v. Anaconda-Deer Lodge County Planning Bd., Sutey Oil sought to expand its business establishment known as the Thriftway Super Stop #7 by "adding a room with four or five gambling machines." The zoning board of adjustment denied a special use permit. The Supreme Court discussion of the purpose of zoning, zoning regulation criteria focused on whether Sutey Oil's "proposed expansion would materially or adversely impact any of the zoning regulation criteria." The Montana Supreme Court held that there was sufficient evidence in the record to support the board of adjustment's conclusion that the proposed special use permit expansion would adversely affect the neighborhood. Sutey Oil Co. Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127; 289 Mont. 99; 959 P.2d 496; 1998 Mont. LEXIS 111.

In North 93 Neighbors Inc. v. Bd. of County Comm'rs, pertaining to proposed growth policy amendments to accommodate a proposed development of a large suburban shopping mall on land formerly used for agricultural purposes, the Court in ¶29 described its decision in Lowe, reversing the rezoning down zoning of a portion of Waterworks Hill as being based upon the city council's failure to address the statutory requirements for zoning amendments through the development of a factual record that could be reviewed by a court for abuse of discretion. The Court then noted that in Schanz it "determined that the information relied upon by the city council in approving the zoning amendment was 'so lacking in fact and foundation' as to render the city council's decision clearly unreasonable and an abuse of discretion. We remanded to the city council for consideration of the statutory criteria." North 93 Neighbors Inc. v. Bd. of County Comm'rs, 2006 MT 132; 332 Mont. 327, 137 P.3d 557, 2006 Mont. LEXIS 228.

It is noteworthy about each of these Montana Supreme Court cases discussing the purpose of zoning statutory criteria that: (1) each pertain to actual changes in zoning classifications and changes of uses of land; and (2) none of the cases discussing the purpose of zoning statutes require any written findings to be made by the local government body making the zoning regulation decision.

It is important the zoning regulation decision be adequately, factually supported within the city council public record in order for the courts to review to determine if the zoning classification change decision has adequate factual evidence present in the record before the decision making body. However, adequate evidence in the record does not require written findings pertaining to the Mont. Code Ann. § 76-2-304 zoning criteria pursuant to current Montana municipal zoning statutes or Montana Supreme Court cases.

While several statutory provisions within the Montana Subdivision and Platting Act require the local governing body to issue written findings, Montana's municipal zoning statutes do not contain similar statutory provisions that require the city council to issue written findings in support of a city council municipal zoning decision.

It is also important to note that pursuant to Montana's rules of statutory construction (interpretation) it is inappropriate for a judge or anyone interpreting a statute to insert language that the Montana State Legislature has omitted.

Mont. Code Ann. § 1-2-101 of Montana's Rules of Statutory Construction state:

> **1-2-101. Role of the judge – preference to construction giving each provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (Emphasis added.)

The Montana Supreme Court has held that it is not the role of the courts to supply statutory omissions. In construing statutes courts cannot insert what has been omitted. See State ex.rel. Palmer v. Hart, 201 M 526, 655 P.2d 965 (1982); Skrukrud v. Gallatin Laundry Co., Inc., 171 M 217, 557 P.2d 278 (1976).

Montana courts may not insert a requirement into municipal zoning statutes that a city council issue written findings with respect to the city council zoning decisions.

**CONCLUSION:**

No, Mont. Code Ann. § 76-2-304 does not require a city council to make written findings with respect to each of the 12 zoning purpose criteria before the city council can make a zoning decision. Further, no other Montana municipal zoning statute requires the city council to make

written findings. The Montana Supreme Court in Foster v. City of Bozeman stated that there was no Montana statute or Supreme Court case law that required a city council to enter written findings in support of its zoning decisions.

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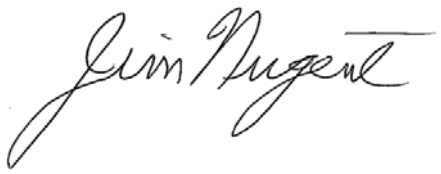

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