

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2012-019

**TO:** Mayor, John Engen; City Council; Bruce Bender; Mike Barton; Director OPG; Laval Means, OPG; Mary McCrea, OPG; Jen Gress, OPG; Tom Zavitz, OPG; Pat Keiley, OPG; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, Deputy City Clerk;

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** November 30, 2012

**RE:** Factual circumstances that generate a requirement for supermajority City Council Member vote to approve a zoning regulation, restriction, and boundary amendment, supplement, change, modification, or repeal

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### **FACTS:**

Wednesday November 28, 2012 pursuant to prior request of the Missoula City Council Plat Annexation and Zoning Committee, for the first time Office of Planning and Grants staff presented an initial draft proposed general regulation zoning ordinance amending title 20, ZONING, chapter 20.45 “ACCESSORY USES AND STRUCTURES”, section 20.45.060 “ACCESSORY DWELLING UNITS” Missoula Municipal Code (MMC). Due to the proposed amendment of section 20.45.060(B)(10) MMC pertaining to the authorized floor area size of an accessory dwelling unit, proposing to reduce the current general zoning regulation authorized size from 800 square feet to 600 square feet, the proposed general regulation pertains to all base zoning districts/classifications within which accessory dwelling units are currently authorized pursuant to city zoning regulations as well as to those zoning districts/classifications which may in the future be authorized pursuant to the specific current zoning amendment proposal.

### **ISSUE:**

Pursuant to Montana municipal zoning protest state law section 76-2-305 MCA and Missoula Municipal Code subsection 20.85.040 (H) MMC what are the factual circumstance requirements for a valid zoning protest to exist that would cause the necessity of a two-thirds vote of approval by those city council members present and voting on the proposed zoning ordinance in order for the proposed zoning ordinance amendment to be adopted?

## **CONCLUSION(S):**

Pursuant to section 76-2-305 MCA pertaining to Montana municipal zoning as well as pursuant to subsection 20.85.040(H) MMC a proposed zoning amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city council if a protest against the zoning regulation change 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 or units, as defined in 70-23-102 pertaining to the "UNIT OWNERSHIP ACT", 150 feet from a lot included in the proposed change.

## **LEGAL DISCUSSION:**

Montana municipal zoning laws are generally set forth in title 76, chapter 2, part 3 Montana Code Annotated (MCA). Section 76-2-305 MCA of Montana's municipal zoning laws is entitled "ALTERATION OF ZONING REGULATIONS-PROTEST". Section 76-2-305 MCA provides as follows:

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 or units, as defined in 70-23-102, 150 feet from a lot included in a proposed change.

(3) (a) For purposes of subsection (2), each unit owner is entitled to have the percentage of the unit owner's undivided interest in the common elements of the condominium, as expressed in the declaration, included in the calculation of the protest. If the property, as defined in 70-23-102, spans more than one lot, the percentage of the unit owner's undivided interest in the common elements must be multiplied by the total number of lots upon which the property is located.

(b) The percentage of the unit owner's undivided interest must be certified as correct by the unit owner seeking to protest a change pursuant to subsection (2) or by the presiding officer of the association of unit owners. (emphasis added)

The City of Missoula has basically set forth the zoning protest requirements of Montana municipal zoning law section 76-2-305 MCA in subsection 20.85.040(H) MMC which states in its entirety as follows:

### **H. Protest Petitions**

1. A formal protest petition opposing a zoning amendment must be submitted to the zoning officer or on the public record before the City Council's vote, allowing sufficient time for the city clerk to determine the validity of the petition.

2. A protest petition will be considered “valid” if it is signed by the owners of 25% or more of:
  - a. the area of the parcels that are the subject of the proposed change; or
  - b. the parcels or units, as defined in MCA 70-23-102, within 150 feet of the parcel that is the subject of the proposed change. The area per unit to be included in the calculation of the protest shall be determined per MCA 76-2-305.
3. When a valid protest petition has been submitted, approval of a zoning amendment requires a 2/3 majority vote of those City Council members present and voting.

Basically the municipal zoning protest law requires that a valid zoning protest that would cause a two-thirds vote requirement of those city council members present and voting in order to approve the zoning proposal must include:

- (1) A written protest signed by 25% or more of the real property owners either:
  - a. Included in the area of the lots included in any change; or
  - b. Included in those lots or units defined in 70-23-102 (unit ownership act), 150 feet from a lot included in a proposed change.
- (2) A vote of approval of two-thirds of those city council members present and actually voting on the proposed zoning amendment is required in order for the zoning ordinance to be approved if there is a valid protest pursuant to law.

Three Montana Attorney General Opinions have been issued concerning Montana’s municipal zoning protest law, section 76-2-305 MCA.

- (1) 37 A. G. Op. 58 (1977) pertaining to identifying the area for computing valid zoning protests, held that a single rezoning proposal which entails separable changes in two separate districts must be considered as two separate proposals for purpose of mapping zoning protest areas and determining the voting requirements. This Montana Attorney General Opinion dated August 25, 1977 was issued to the City of Missoula concerning the factual circumstances wherein a newly elected city council member proposed rezoning of all of ward three (3) to a very restrictive single family zoning district (including commercial/business/retail/professional office areas) even though all of ward three (3) was not zoned one single zoning district. This rezoning action was in response to recent construction of multiple multi-family dwelling units within ward three (3) pursuant to then applicable zoning. Therefore, the Montana Attorney General indicated that each geographically separable zoning district had its own protest calculation. For example the commercial area on Higgins Avenue North of Hellgate High School was a separate zoning protest area from the commercial area on Orange Street; so those are examples of several geographic areas that were able to successfully protest out of the restrictive single family zoning district proposal.
- (2) 41 A. G. Op. 68 held that section 76-2-305, MCA, applies to proposed zoning amendments affecting nonrectangular or non-square parcels or irregularly shaped parcels of land. In such instances, identification of the statutorily-defined protest areas affected by the proposed zoning amendments must be made in reference to the

specific particular factual circumstances on a case by case basis. This Montana Attorney General Opinion interpreting the application of Montana municipal zoning protest law was also issued to the City of Missoula and pertained the City of Missoula's zoning protest calculations with respect to land at issue that was bounded by Hillview Way as well as involving boundaries unassociated with any public rights of way in some aspects.

(3) 46 A. G. Op. 5 (1995) held that the zoning protest statute, section 76-2-305 MCA applied to interim zoning measures whenever a zoning regulation is proposed to be amended pursuant to an interim zoning ordinance. This Montana Attorney General Opinion holding that the interim zoning measures adopted pursuant to section 76-2-306 MCA were subject to the protest provisions of section 76-2-305 MCA also was issued to the City of Missoula and basically arose out of citizen efforts to have the city council adopt an interim zoning ordinance pertaining to replacement of billboards; because planners had allowed a billboard replacement that they disagreed with. The zoning protest area was limited to the affected parcels of land, the parcels with existing billboards.

**CONCLUSION(S):**

Pursuant to section 76-2-305 MCA pertaining to Montana municipal zoning as well as pursuant to subsection 20.85.040(H) MMC a proposed zoning amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city council if a protest against the zoning regulation change 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 or units, as defined in 70-23-102 pertaining to the "UNIT OWNERSHIP ACT", 150 feet from a lot included in the proposed change.

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Jim Nugent, City Attorney

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