

OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2012-021

TO: Mayor John Engen, City Council, Bruce Bender, Mary Rehbein, Brentt Ramharter

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE December 3, 2012

RE: Legislative Body Member personal liability immunity pursuant to Legislative Immunity for Legislative Acts such as adoption of laws (ordinances) during Legislative Meetings.

FACTS:

During the Wednesday November 28, 2012 Missoula City Council Plat Annexation and Zoning (PAZ) Committee meeting, when the Office of Planning and Grants staff at the prior request of the PAZ committee members, presented for the first time a proposed city zoning ordinance amendment pertaining to accessory dwelling units, one citizen who opposed the proposed ordinance amendment suggested in her public comments to the PAZ committee that it was city council malfeasance and/or violation of law to adopt the proposed ordinance. She went on to state that if city council members adopted the proposed ordinance; because it would be malfeasance or a violation of law that the city council members may not be indemnified for their conduct in adopting the ordinance.

ISSUE(S):

Are members of a legislative body, such as a city council, vulnerable to personal liability for legislative acts pursuant to which the legislative body adopts law or create public policy?

CONCLUSION(S):

No, members of a legislative body, such as a city council, are not vulnerable to personal liability for legislative acts pursuant to which the legislative body adopts law or creates public policy. Pursuant to Montana law, section 2-9-111 MCA legislative bodies have legislative immunity when adopting legislative acts that create law or declare public policy and pursuant to section 2-9-305 MCA are also indemnified for their actions taken within the course and scope of their employment.

LEGAL DISCUSSION:

Title 2, chapter 9 MCA is entitled “LIABILITY EXPOSURE AND INSURANCE COVERAGE”, Part 1 of title 2, chapter 9 MCA is entitled “liability exposure”. These state laws apply to Montana municipalities.

Initially it should be noted that pursuant to section 2-9-103 MCA state law specifically provides that if an officer of a governmental entity acts in good faith, without malice or corruption pursuant to a law or ordinance and that law or ordinance is subsequently declared invalid the officer is not civilly liable in any action in which liability would attach. Section 2-9-103 MCA provides as follows:

2-9-103. Actions under invalid law or rule -- same as if valid -- when. (1) If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared invalid as in conflict with the constitution of Montana or the constitution of the United States, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which the individuals or governmental entity would not have been liable if the law had been valid.

(2) If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of a duly promulgated rule or ordinance and that rule or ordinance is subsequently declared invalid, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which liability would not attach if the rule or ordinance had been valid.

Section 2-9-105 MCA establishes governmental entity immunity from exemplary or punitive damages stating:

“2-9-105. STATE OR OTHER GOVERNMENTAL ENTITIES IMMUNE FROM EXEMPLARY AND PUNITIVE DAMAGES. The state and other governmental entities are immune from exemplary and punitive damages.”

Both the United States and Montana Supreme Court have held that government entities are immune from exemplary or punitive damages. Montana Supreme Court cases include *White v. State of Montana*, 203 M 363, 661 P.2d 1272 (1983); and *Birkenbuel v. Montana State Compensation Insurance Fund*, 212 M 139, 687 P 2d 700 (1984).

Section 2-9-111 MCA, General Legislative immunity may exist pursuant to entitled “IMMUNITY FROM SUIT FOR LEGISLATIVE ACTS AND OMISSIONS”. Section 2-9-111 MCA provides:

2-9-111. Immunity from suit for legislative acts and omissions. (1) As used in this section:

(a) the term "governmental entity" means only the state, counties, municipalities, school districts, and any other local government entity or local political subdivision vested with legislative power by statute;

(b) the term "legislative body" means only the legislature vested with legislative power by Article V of The Constitution of the State of Montana and that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;

(c) (i) the term "legislative act" means:

(A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of The Constitution of the State of Montana; or

(C) actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);

(ii) the term legislative act does not include administrative actions undertaken in the execution of a law or public policy.

(2) A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts.

(3) Any member or staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with legislative acts of the legislative body.

(4) The acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity does not waive the immunity provided by this section.

(5) The immunity provided for in this section does not extend to:

(a) any tort committed by the use of a motor vehicle, aircraft, or other means of transportation; or

(b) any act or omission that results in or contributes to personal injury or property damage caused by contamination or other alteration of the physical, chemical, or biological properties of surface water or ground water, for which a cause of action exists in statutory or common law or at equity. This subsection (b) does not create a separate or new cause of action. (emphasis added)

Pursuant to subsection 2-9-111(1)(c) MCA the term "legislative act" is defined as including "ACTIONS BY A LEGISLATIVE BODY THAT RESULT IN THE CREATION OF LAW OR DECLARATION OF POLICY." (emphasis added)

Title 2, chapter 9, part 3 is entitled "CLAIMS AND ACTIONS". It is also important to note and emphasize section 2-9-305 MCA which is entitled "IMMUNIZATION, DEFENSE, AND INDEMNIFICATION OF EMPLOYEES" for their actions taken within the course and scope of their employment. Section 2-9-305 MCA provides:

2-9-305. Immunization, defense, and indemnification of employees. (1) It is the purpose of this section to provide for the immunization, defense, and indemnification of

public officers and employees civilly sued for their actions taken within the course and scope of their employment.

(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee's office or employment, the governmental entity employer, except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the employee.

(3) Upon receiving service of a summons and complaint in a noncriminal action against an employee, the employee shall give written notice to the employee's supervisor requesting that a defense to the action be provided by the governmental entity employer. If the employee is an elected state official or other employee who does not have a supervisor, the employee shall give notice of the action to the legal officer or agency of the governmental entity defending the entity in legal actions of that type. Except as provided in subsection (6), the employer shall offer a defense to the action on behalf of the employee. The defense may consist of a defense provided directly by the employer. The employer shall notify the employee, within 15 days after receipt of notice, whether a direct defense will be provided. If the employer refuses or is unable to provide a direct defense, the defendant employee may retain other counsel. Except as provided in subsection (6), the employer shall pay all expenses relating to the retained defense and pay any judgment for damages entered in the action that may be otherwise payable under this section.

(4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee must be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit unless the employee's conduct falls within the exclusions provided in subsection (6).

(5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d).

(6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:

(a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the employee's employment;

(b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;

(c) the employee compromised or settled the claim without the consent of the government entity employer; or

(d) the employee failed or refused to cooperate reasonably in the defense of the case.

(7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the governmental entity employer may determine whether those exclusions apply. However, if there is a dispute as to whether the exclusions of subsection (6) apply and the governmental entity employer concludes that it should clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the employee until a final judgment is rendered in that action holding that the employer did not have an obligation to defend the employee. The governmental entity employer does not have an obligation to provide a defense to the employee in a declaratory judgment action or other legal action brought against the employee by the employer under this subsection.

CONCLUSION(S):

No, members of a legislative body, such as a city council, are not vulnerable to personal liability for legislative acts pursuant to which the legislative body adopts law or creates public policy. Pursuant to Montana law, pursuant to section 2-9-111 MCA legislative bodies have legislative immunity when adopting legislative acts that create law or declare public policy and pursuant to section 2-9-305 MCA are also indemnified for their actions taken within the course and scope of their employment.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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