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## Legal Opinion 2013-005

**TO:** John Engen, Mayor; City Council; Bruce Bender, Denise Alexander, Laval Means, Tom Zavitz, Jen Gress, Mary McCrea, Kevin Slovarp, Don Verrue

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** March 21, 2013

**RE:** Factors to consider when evaluating legality of spot zoning

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### **FACTS:**

City Council has requested legal information concerning factors to be considered when evaluating spot zoning's legality in a specific factual circumstance.

### **ISSUES:**

What factors has the Montana Supreme Court identified to be determined as part of a review of spot zoning for its legality?

### **CONCLUSIONS:**

The Montana Supreme Court identified factors to be reviewed and considered when determining whether a zoning proposal is legal spot zoning includes whether:

1. The proposed use is significantly different from the prevailing use in the area.
2. The land area is small from the perspective of the number of separate benefitted land owners from the proposed change.
3. The zoning change is designed to only benefit one or a few land owners.

Usually all three factors must be present for it to be illegal spot zoning.

### **LEGAL DISCUSSION:**

Basically any zoning or rezoning of land is spot zoning with respect to the land area proposal to be zoned or rezoned. Spot zoning is not necessarily illegal simply because someone alleges it is spot zoning. In Little v. Board of County Comm'rs the 1981 Montana Supreme Court in a proposed shopping center zoning for 59 acres identified three factors that enter into a

determination of whether illegal spot zoning exists in any proposed zoning. All three of these factors must exist for the "spot" zoning to be determined to be unlawful spot zoning:

- (1) the proposed use is significantly different from the prevailing use in the area;
- (2) the area in which the requested use is to apply is rather small from the perspective of concern with the number of separate landowners benefited from the proposed change;
- (3) the change is special legislation designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little v. Board of County Comm'rs, 193 Mont. 334; 631 P.2d 1282; 1981 Mont. LEXIS 784 (1981). The Montana Supreme Court in Little, supra, also stated "there is no single comprehensive definition of spot zoning applicable to all fact situations. The Court noted that if spot zoning is invalid usually all three (of the above mentioned) elements are present." The Montana Supreme Court in Little also stated "It is really a question of preferential treatment for one or two persons as against the general public, regardless of the size of the tract involved. Illegal spot zoning was determined to exist in Little.

The Montana Supreme Court noted that the three factors are not mutually exclusive and cautioned that any definition of Spot Zoning must be flexible enough to cover the constantly changing circumstances under which the test is applied. Little 631 P2d at 1289.

The Montana Supreme Court also has held illegal spot zoning occurred with respect to a 323 acre PUD zoning proposal near Yellowstone Park in a Hebgen Lake zoning district proposing a golf course, 10 acres of commercial land, 11 acres of multi-family and 65 acres of single family residential. The proposed zoning changes conflicted with prevailing land use in the area at the expense of the general public and surrounding land uses. Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs, 2001 MT 99; 305 Mont. 232; 25 P.3d 168; 2001 Mont. LEXIS 119. A similar conclusion was reached for a 668 acre rezoning of agricultural land to heavy industrial to allow for construction of a power plant which was out of character with existing agricultural land uses in the vicinity. Plains Grains L.P. v. Bd. of County Comm'rs, 2010 MT 155; 357 Mont. 61; 238 P.3d 332; 2010 Mont. LEXIS 238.

83 Am.Jur.2d, Zoning and Planning, §111, Generally-Validity in part observes the following with respect to spot zoning:

"Whether an ordinance is unconstitutional **spot zoning** is case specific. **Spot zoning** is not automatically invalid, and if it is germane to an object within the police power and there is a reasonable basis to treat the **spot-zoned** property differently from the surrounding property, the **spot zoning** is valid. A reasonable basis for **spot zoning** is established when a **zoning** authority clearly shows that the potential benefits to the property owner, the owner's neighbors, and/or the surrounding community outweigh the potential detriments to those neighbors and/or the surrounding community as a whole."

Rathkopf, *The Law of Zoning and Planning*, Vol. 3, §§ 41:2, 41-3 and 41-4 provides:

NIMBY lawsuits that challenge the validity of a specific rezoning based on an illegal spot zoning claim usually prove unsuccessful. Today, courts generally hold that the “spot zoning” of an individual tract or relatively small parcel of land is not per se invalid. (Emphasis added.)

Rathkopf, Vol. 3, § 41:5 indicates that zoning amendments are often upheld if they promote the general welfare. Rathkopf goes on at 41-29 to state:

Where the interest of the general community and the immediate neighborhood do coalesce, the rezoning of a small parcel is even more likely to be upheld.

Courts have also held that small parcel rezoning to permit the continuation of a destroyed or previously abandoned nonconforming use is valid if necessary to prevent deterioration of the property and depreciation of neighboring property values. (Emphasis added.)

83 Am.Jur.2d, *Zoning and Planning*, §112, determination factors considered states:

“In order to establish the validity of a **zoning** ordinance alleged to constitute impermissible **spot zoning**, the finder of fact must determine (1) if the **zoning** activity constituted **spot zoning** as the courts have defined that term; and (2) if so, whether the **zoning** authority made a clear showing of a reasonable basis for the **zoning**. One test for **spot zoning** is (1) whether the requested use is significantly different from the prevailing use in the area; (2) whether the area in which the requested use is to apply is small, although not solely in physical size, and an important inquiry under this factor is how many separate landowners will benefit from the **zone** classification; and (3) whether the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or general public, which should involve an inquiry into whether the requested use is in accord with a comprehensive plan...”

This test appears consistent with Montana Supreme Court case law.

The Montana Supreme Court continues to rely on the three factors identified in the Little Decision as the review criteria for determination of validity of spot zoning. Several Montana Supreme Court decisions hold specific spot zoning to be legal.

1. Boland v. City of Great Falls, 275 Mont. 128; 910 P.2d 890; 1996 Mont. LEXIS 17; (1996), the Supreme Court held that no illegal spot zoning occurred and indicated that the zoning change would benefit the adjacent property owners whose property values would tend to increase from the project development; and that there would be benefit to more landowners than the individuals whose property was being zoned and therefore the zoning was not in the

nature of special legislation designed to benefit only one landowner. While the condominium project could provide maximum density 29% higher than single detached residences the zoning district allowed town houses as a conditional use.

2. Citizen Advocates for a Livable Missoula, Inc. v. City Council (CALM), 2006 MT 47; 331 Mont. 269; 130 P.3d 1259; 2006 Mont. LEXIS 59, Broadway-Scott Gateway Special District rezoning proposal for West Broadway Safeway did not constitute illegal spot zoning, the benefit was not conferred at the expense of the general public. The Safeway facility is not significantly different from prior uses in 800-900 Blocks of West Broadway. The health of Safeway and St. Patrick's Hospital was deemed to be in the public interest.

3. North 93 Neighbors, Inc. v. Bd. of County Comm'rs, 2006 MT 132; 332 Mont. 327; 137 P.3d 557; 2006 Mont. LEXIS 228, despite Wolford's sole ownership of the parcel, county commissioners did not enact zoning amendment at expense of surrounding land owners or the general public. The zoning amendment did not allow for uses that differ significantly from the prevailing uses in the area.

4. Lake County First v. Polson City Council, 2009 MT 322; Mont. 489; 218 P.3d 816; 2009 Mont. LEXIS 470, Wal-mart annexation and zoning from low density residential to a heavy highway commercial zoning district not illegal spot zoning because Supreme Court "cannot conclude that the benefit is inappropriately conferred at the expense of the general public." The zoning change and proposed use of the property were not significantly different than the prevailing use in the area. The property at issue was bound on three sides by highway commercial zoning.

Charles S. Rhyne in *The Law of Local Government Operations*, at 761, explains:

However, a zoning change is not invalid merely because only one parcel of land or only one owner is involved. While the size of the parcel involved is important, the validity or invalidity of alleged "spot zoning" depends upon more than the size of the parcel, and while spot zoning is not looked upon with favor, it is not necessarily illegal. "Spot zoning" is a descriptive term and not a term of art, the validity or invalidity depending upon the facts and circumstances involved.  
(Emphasis added.)

McQuillan, *Municipal Corporations*, 3<sup>rd</sup> Edition Revised, Vol. 8, § 25.90, provides:

#### **§25.90. - Valid "spot" zoning.**

"Island" or "spot" zoning may be justified where it is germane to an object within the police power, and no hard and fast rule that such zoning is illegal can be announced. The matter involved is essentially legislative in character and the determination made concerning it may be attacked in the courts only if it is without a reasonable basis.....

As previously stated, spot zoning is not per se illegal, but rather illegal only if lacking a reasonable basis. The validity of "spot" or "island" zoning depends upon more than the size of the "spot" or the fact that it is surrounded by uses of another character than those for which the "spot" is zoned. In other words, there are exceptional cases in which "island" or "spot" zoning is a valid exercise of the police power; the decision in each case turns upon its own facts and circumstances. (Emphasis added.)

Earlier in § 25.89, *McQuillin*, provides: "The burden of demonstrating that a particular zoning amendment is illegal "spot zoning" rests with the party attacking the ordinance." (Emphasis added.)

The Montana Supreme Court has provided some detailed analysis and explanation concerning spot zoning analysis.

1.) In Little the Montana Supreme Court stated:

There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance. First, in spot zoning, the requested use is significantly different from the prevailing use in the area. Second, the area in which the requested use is to apply is rather small. This test, however, is concerned more with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited. Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public. See, Williams, 1 American Land Planning Law, at 563; Hagman, Urban Planning and Land Development Control Law (1971), at 169; Rhyne, The Law of Local Government Operations (1980), at 760-761.

In explaining the third test, Hagman gives this qualification:

"The list is not meant to suggest that the three tests are mutually exclusive. If spot zoning is invalid, usually all three elements are present, or, said another way, the three statements may merely be nuances of one another." Hagman at 169.

This qualification must be heeded because any definition of spot zoning must be flexible enough to cover the constantly changing circumstances under which the test may be applied. . . .

Rather, it is really a question of preferential treatment for one or two persons as against the general public, regardless of the size of the tract involved. (Emphasis added.)

Little v. Board of County Comm'rs, 193 Mont. 334; 631 P.2d 1282; 1981 Mont. LEXIS 784 (1981)

In Boland the Montana Supreme Court analyzed Little and spot zoning and concluded no illegal spot zoning occurred in the Great Falls case explaining:

2.) In *Little v. Board of County Commissioners of Flathead County* (1981), 193 Mont. 334, 631 P.2d 1282, we identified the following three factors that are generally present when illegal spot zoning occurs, which we restate as follows:

1. The requested use is significantly different from the prevailing use in the area.
2. The area in which the requested use is to apply is rather small, however, this factor is more concerned with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited.
3. The requested change is more in the nature of special legislation.

In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little, 631 P.2d at 1289. We noted that the three factors are not mutually exclusive and cautioned that any definition of spot zoning must be flexible enough to cover the constantly changing circumstances under which the test may be applied. *Little*, 631 P.2d at 1289. . . .

While the maximum density level will be twenty-nine percent higher than if the Property were developed solely as single family detached residences, it is important to note that the "A" residence zone permits "town-houses" as a conditional use.

We conclude that the proposed condominium project is essentially residential in nature and not significantly different from the prevailing use in the area. Therefore, the first prong of the Little test is not satisfied.

Having made that determination, we now must determine whether it is necessary to proceed to the final two elements of the Little test. In explaining the test, we stated that "[i]f spot zoning is invalid, usually all three elements are present or, said another way, the three statements may merely be nuances of one another." *Little*, 631 P.2d at 1289 (citing *Hagman, Urban Planning and Land Development Control Law* (1971) at 169). Since we held in *Little* that "usually" all three elements are required to establish illegal spot zoning, it is possible illegal spot zoning can occur in the absence of an element. . . .

The second and third elements of the Little test must be analyzed together. The number of separate landowners affected by the rezoning relates directly to whether or not the rezoning constitutes special legislation in favor of only one person. Since none of the surrounding landowners have been granted permission to build condominiums on their property, plaintiffs argue that rezoning the

Property benefits only the condominium developer. We determine that the plaintiffs' viewpoint is too narrow in its scope.

We agree with the plaintiffs that the primary focus of the second and third Little factors is not the benefit resulting from the development of the Property, but rather the benefit to landowners as a result of the rezoning. However, we disagree with plaintiffs' contention that only the condominium developer will benefit as a landowner from the zoning change.

Our review of the record indicates that the orphanage was razed on or about March 1983. After the building was razed, the Property was placed for sale and for approximately seven years prior to the proposed development the Sisters had received no serious offers to purchase the land. The Property has deteriorated over the years to the extent that it now contains a variety of nuisances and eyesores, including broken glass, animal excrement, noxious weeds, unkempt and dead vegetation, unfilled basements, and abandoned boilers. The City offered testimony that the zoning change would increase the value and salability of the surrounding property by eliminating the existing blight resulting from the nonuse of the lots and by eliminating the uncertainty of the future use of the Property, thereby benefiting the surrounding neighborhood. We therefore agree with the District Court which found that the zoning change would benefit the adjacent property owners whose property values would tend to increase from the project development. Thus, rezoning the Property will directly benefit more landowners than merely the individual developer. We therefore conclude the zoning change is not in the nature of special legislation designed to benefit only one landowner. (Emphasis added.)

Boland v. City of Great Falls, 275 Mont. 128; 910 P.2d 890; 1996 Mont. LEXIS 17; (1996)

3.) Citizen Advocates for a Livable Missoula v. City Council (CALM) pertaining to the new Safeway on West Broadway in Missoula held that no illegal spot zoning occurred pursuant to the rezoning stating:

Here, the zoning proposal and proposed Safeway facility are not significantly different from prior uses and zoning within the 800 and 900 blocks of the West Broadway community. Similar to the former zoning classifications of C (Commercial), RH (High Rise), and P-2 (Public Lands and Institutions), the current zoning proposal continues to provide for a mixed use of residential and business uses. Furthermore, the Planning Board noted that other "big box" grocery stores have historically used the area, specifically " the Big Broadway," illustrating that the proposed Safeway is not " significantly different" from past uses.

Finally, while the zoning proposal certainly benefits Safeway and SPH, we cannot conclude that the benefit is conferred at the expense of the general public. To the contrary, as a matter of adopted policy under the neighborhood plans, the health

of Safeway and SPH is deemed to be in the public's interest. For that reason, and for the others listed above, we agree with the District Court that the zoning proposal does not constitute illegal spot zoning. (Emphasis added.)

Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, ¶33 ¶34; 331 Mont. 269; 130 P.3d 1259; 2006 Mont. LEXIS 59.

4.) North 93 Neighbors, Inc. v. Bd. of County Comm'rs, 2006 MT 132 ¶70; 332 Mont. 327; 137 P.3d 557; 2006 Mont. LEXIS 228., the Montana Supreme Court concluded that there was no illegal spot in zoning stating that:

We therefore conclude that despite Wolford's sole ownership of the parcel, the Board did not enact the Zoning Amendment at the expense of surrounding landowners or the general public. (Emphasis added.)

## **CONCLUSIONS:**

The Montana Supreme Court identified factors to be reviewed and considered when determining whether a zoning proposal is legal spot zoning includes whether:

1. The proposed use is significantly different from the prevailing use in the area.
2. The land area is small from the perspective of the number of separate benefitted land owners from the proposed change.
3. The zoning change is designed to only benefit one or a few land owners.

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