

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2013-012

**TO:** Department City Clerk, Department Mayor's Office, Brett Ramharter

**CC:** City Council, Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** May 1, 2013

**RE:** Neighborhood councils and community forum required public meetings, public participation, and public decision making.

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### **FACTS:**

The Montana Constitution, Montana state law, Missoula Municipal Code and City of Missoula charter require that neighborhood councils and community forum must operate pursuant to public meetings, with adequate reasonable opportunity for public participation whenever engaging in neighborhood council or community forum decision making or making recommendations with respect to matters within their authority, such as advisory, budget and grant application recommendation authority to be communicated to City of Missoula officials.

### **ISSUE(S):**

Are neighborhood councils as well as the community forum required to hold public meetings with reasonable opportunity for adequate public participation in the public meetings prior to any final decision being made?

### **CONCLUSION(S):**

Yes, the Montana Constitution, Montana state law, Missoula Municipal Code and City of Missoula self-government charter provide for a public right of participation as well as a public right to know and observe public deliberations with respect to local government entity or agency meetings and decision making.

### **LEGAL DISCUSSION:**

Pursuant to Article II, sections 8 and 9, Montana's Constitution establishes both a Montana Constitutional right of public citizenry participation in government public agency decision making as well as creates a public Constitutional right to know that includes the Constitutional

rights to observe the deliberations of all public bodies. These Montana Constitutional mandated rights provisions provide as follows:

Article II, Section 8. RIGHT OF PARTICIPATION. THE PUBLIC HAS THE RIGHT TO EXPECT GOVERNMENTAL AGENCIES TO AFFORD SUCH REASONABLE OPPORTUNITY FOR CITIZEN PARTICIPATION in the operation of the agencies PRIOR TO THE FINAL DECISION as may be provided by law. (emphasis added)

Article II, Section 9, RIGHT TO KNOW. NO PERSON SHALL BE DEPRIVED OF THE RIGHT to examine documents or TO OBSERVE THE DELIBERATIONS OF ALL PUBLIC BODIES OR AGENCIES of state government AND ITS SUBDIVISIONS except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (emphasis added)

The Montana Constitution is the supreme law of Montana. In the event that Montana state law, city ordinance or city charter does not fully address a topic or is inconsistent with the Montana Constitution, the Montana Constitutional provision controls.

Montana state law, title 2, chapter 3 MCA is entitled “PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS”. Part 1 of this chapter 3 is entitled “NOTICE AND OPPORTUNITY TO BE HEARD”. Section 2-3-101 MCA pertaining to the legislative intent of title 2, chapter 3, states that ”PURSUANT TO THE MANDATE OF ARTICLE II, SECTION 8, OF THE 1972 MONTANA CONSTITUTION” Montana state law is established “to secure to the people of Montana their CONSTITUTIONAL RIGHT TO BE AFFORDED REASONABLE OPPORTUNITY TO PARTICIPATE IN THE OPERATION OF GOVERNMENTAL AGENCIES PRIOR TO THE FINAL DECISION OF THE AGENCY. (emphasis added)

Pursuant to section 2-3-103 MCA “EACH AGENCY SHALL DEVELOP PROCEDURES FOR PERMITTING AND ENCOURAGING THE PUBLIC TO PARTICIPATE IN AGENCY DECISIONS THAT ARE OF SIGNIFICANT INTEREST TO THE PUBLIC. THE PROCEDURES MUST ENSURE ADEQUATE NOTICE AND ASSIST PUBLIC PARTICIPATION BEFORE A FINAL AGENCY ACTION IS TAKEN THAT IS OF SIGNIFICANT INTEREST TO THE PUBLIC.” (emphasis added)

Part 2 of Title 2, chapter 3 MCA is entitled “OPEN MEETINGS”. Section 2-3-201 MCA entitled “LEGISLATIVE INTENT---LIBERAL CONSTRUCTION, provides in pertinent part that “IT IS THE INTENT OF THIS PART THAT ACTIONS AND DELIBERATIONS OF ALL PUBLIC AGENCIES SHALL BE CONDUCTED OPENLY.” (emphasis added)

Section 2-3-202 MCA defines the term “meeting” for purposes of Montana’s open meeting/public participation laws as meaning “the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203 whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or ADVISORY POWER.(emphasis added) The 1980 Montana

Supreme Court in *Board of Trustees, Huntley Project School District, No 24 v. Board of County Commissioners County of Yellowstone*, 186 Mont. 148, 606 P. 2d 1069(1980) nullified the telephone decision making proceedings associated with two Yellowstone County Commissioners pursuant to a telephone call two days after a public hearing, whereby the County Commissioners voted and approved a subdivision after a public hearing; because the telephone meeting was not held in conformance with Montana's open meeting laws. The Montana Supreme Court held that "a meeting took place . . . by means of electronic device (telephone) (to) act upon a matter over which the agency had supervision, control, jurisdiction, or advisory power."

The Montana Supreme Court after concluding that the Yellowstone County Commissioners failed to comply with the notice requirements of Montana state law went on to state:

" . . . It is difficult to envision an open meeting held without public notice that still accomplishes the legislative purpose of the Montana open meeting statutes. WITHOUT PUBLIC NOTICE, AN OPEN MEETING IS OPEN IN THEORY ONLY, NOT IN PRACTICE. THIS TYPE OF CLANDESTINE MEETING VIOLATES THE SPIRIT AND THE LETTER OF THE MONTANA OPEN MEETING LAW." (emphasis added), *supra* at 1055-1056.

Later the Montana Supreme Court went on to state that the procedure followed by the county commissioners "was improper". "The FAILURE HERE TO FOLLOW PROPER STATUTORY PROCEDURES OF NOTICE HAS THE EFFECT OF INVALIDATING the commissioner's decision." (emphasis added), *supra*, 157.

Section 2-3-203 MCA requires that "ALL MEETINGS OF PUBLIC GOVERNMENTAL BODIES, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations SUPPORTED IN WHOLE OR IN PART BY PUBLIC FUNDS OR EXPENDING PUBLIC FUNDS" shall be open to the public. (emphasis added). Further, pursuant to subsection 2-3-203(6) MCA, any committee or subcommittee of any of the aforementioned entities must conduct their meetings as open public meetings with public participation.

Public notice requirements for public body agendas and means and mechanisms for providing public notice are addressed in sections 2-3-103 through 2-3-105 MCA.

Montana state local government law allows a municipal local government to establish community councils to advise city elected officials, including the mayor and city council. See subsection 7-3-223(2) MCA.

Montana Municipal local government law pursuant to sections 7-1-4141, 7-1-4142 and 7-1-4143, MCA also provides for public meetings and public participation in Municipal government operations including for committees or other entities created by a municipality. These sections provide:

**7-1-4141. Public meeting required.** (1) All meetings of municipal governing bodies, boards, authorities, committees, or other entities created by a municipality shall be open

to the public except as provided in 2-3-203. (2) Appropriate minutes shall be kept of all public meetings and shall be made available upon request to the public for inspection and copying. (emphasis added)

**7-1-4142. Public participation.** Each municipal governing body, committee, board, authority, or entity, in accordance with Article II, Section 8, of the Montana Constitution and Title 2, Chapter 3, shall develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public. (emphasis added)

**7-1-4143. Participation.** In any meeting required to be open to the public, the governing body, committee, board, authority, or entity shall adopt rules for conducting the meeting, affording citizens a reasonable opportunity to participate prior to the final decision. (emphasis added)

The City of Missoula self-government charter approved by the city voters June 4, 1996, effective January 1, 1997, pursuant to ARTICLE VI, NEIGHBORHOOD COUNCILS AND COMMUNITY COUNCIL, in part, in section 1 “PURPOSE” identifies the following extensive public participation related purposes for the existence of neighborhood councils:

- (1) To strengthen neighborhood participation;
- (2) To encourage and support neighborhood participation;
- (3) Neighborhood Councils and Community Councils shall provide a structure for increased citizen participation in the governance of the City and shall build cooperation and improved communication between citizens and City officials
- (4) Advising the City on neighborhood projects as they occur; and
- (5) To come together, share information and make recommendations to the City Council and Mayor.

Section 2, of Article VI, NEIGHBORHOOD COUNCILS AND COMMUNITY COUNCIL, identifies the following aspects that are intended to encourage public participation in neighborhood councils:

- (1) All residents within the boundaries of a neighborhood district shall be eligible to serve on Neighborhood Councils, participate with Neighborhood Councils, or participate in the selection of officers for their Neighborhood Council;
- (2) Neighborhood Councils shall be responsible for providing information; and
- (3) Neighborhood Councils shall facilitate participation in, coordination of, neighborhood-initiated projects.

Title 1, chapter 18 Missoula Municipal Code (MMC) is entitled “NEIGHBORHOOD COUNCILS AND COMMUNITY FORUM”. Section 1.18.010 MMC entitled “PURPOSE” includes the following provisions related to encouraging public participation in Neighborhood Councils and/or the Community Forum:

- (1) Our democracy is enriched by the active participation of an informed citizenry;

- (2) Strengthen neighborhood participation in city governance;
- (3) To encourage and support neighborhood participation in City governance;
- (4) Neighborhood Councils are hereby established to provide a structure for increased citizen participation in the governance of the City;
- (5) To provide an arena to come together, share information, and make recommendations to City government; and
- (6) Neighborhood Councils and Leadership Teams are encouraged to build opportunities for neighborhood communication.

Section 1.18.020 MMC pertaining to definitions indicates in the definition of “modified town meeting process” that key features include:

- (1) All members of the Neighborhood Council shall participate in the conduct of business; and
- (2) Each leadership team shall make every reasonable effort to provide members with timely notice regarding location of meeting and agenda of ALL Neighborhood Council meetings (emphasis added)

Section 1.18.030 MMC entitled “AUTHORITY” indicates in part that:

- (1) Each Neighborhood Council and the Community Forum may advise the City government on neighborhood and city wide issues; and
- (2) Each Neighborhood Council and the Community Forum may act to increase citizen participation in the governance of the City and to enhance communication between citizens and City officials.

Section 1.18.040 MMC entitled “DUTIES” includes such features as:

- (1) Each Neighborhood Council and the Community Forum shall advise the City government on neighborhood and citywide issues;
- (2) Each Neighborhood Council shall make every reasonable effort to provide eligible members with timely information regarding City-initiated projects which impact the neighborhood;
- (3) All residents shall be eligible for voting and decision making in the Neighborhood Council;
- (4) Each Neighborhood Council and the Community Forum shall strive to increase citizen participation in the governance of the City;
- (5) Neighborhood Councils and Leadership Teams are encouraged to build opportunities for neighborhood communication, neighborhood-initiated projects, interaction, and problem solving.

Section 1.18.050 MMC entitled “LEADERSHIP TEAM” includes Neighborhood Council Leadership Team member responsibilities such as:

- (1) Communicating with Neighborhood Council members; and

(2) Neighborhood Councils and Leadership Teams are encouraged to build opportunities for neighborhood communication, neighborhood initiated projects, interaction, and problem solving.

Section 1.18.060 MMC entitled “MEETINGS” includes such public participation and public meeting aspects as:

- (1) All members of the Neighborhood Council who attend meetings are encouraged to participate in the conduct of business and the process of deliberation and decision making;
- (2) Each Neighborhood Council and the Community Forum shall establish rules for decision making;
- (3) All Neighborhood Council and Community Forum meetings shall be noticed and conducted in accordance with relevant city, state, and federal statutes including the MONTANA OPEN MEETING LAW PUBLIC PARTICIPATION IN GOVERNMENT OPERATIONS statute; and
- (4) Each Neighborhood Council and the Community Forum shall be responsible for fulfilling city, state and federal meeting notification and location requirements.

**CONCLUSION(S):**

Yes, the Montana Constitution, Montana state law, Missoula Municipal Code and City of Missoula self-government charter provide for a public right of participation as well as a public right to know and observe public deliberations with respect to local government entity or agency meetings and decision making.

OFFICE OF THE CITY ATTORNEY

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