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Legal Opinion 2013-020

TO: Mayor John Engen, City Council, Bruce Bender, Mike Haynes, Laval Means, Tom Zavitz, Denise Alexander, Marty Rehbein, Nikki Rogers, Kevin Slovarp

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE September 3, 2013

RE: Retroactive laws may be legal in some instances; but always must declare their retro-activeness.

FACTS:

Currently, there are City Council Members interested in a potential retroactive urgency interim zoning ordinance that would apply to certain specific change of use applications submitted after the date City Council formally commenced an emergency urgency proposed ordinance review.

ISSUE(S):

May proposed legislation have a retroactive date that makes the legislative proposal applicable to some applications that are pending review on the date of adoption?

CONCLUSION(S):

Subject to limited constitutional restrictions, a legislative proposal may have a retroactive applicability date that predates the date the legislative proposal is adopted. For example, a legislative body may specify that new legislative enactments apply to subdivision applications pending review. For example, see subsection 76-3-604(9), MCA of the Montana Subdivision and Platting Act.

LEGAL DISCUSSION:

Section 1-2-109 MCA of Montana's Statutory rules of statutory construction (interpretation) provides:

> "1-2-109. When laws retroactive. No law contained in any of the statutes of Montana is retroactive unless expressly so declared." (emphasis added)

Montana's municipal zoning state laws do not address the aspect of what regulations apply to a factual circumstance where either regulations are formally proposed for revision prior to the submittal of an application, and/or regulations change during the zoning application review period. The Montana Subdivision and Platting Act does specifically address the topic of revised subdivision regulations occurring during the subdivision review time period. The Montana Subdivision and Platting Act pursuant to subsection 76-3-604(9) MCA initially provides that subdivision approval, conditional approval or denial of a subdivision application is determined by the regulations in effect at the time a subdivision application is determined to contain sufficient information for review; but if the subdivision regulations change during the review periods the new regulations apply to determining whether the subdivision application contains the required elements and sufficient information.

Subsection 76-3-604(9) MCA of the Montana Subdivision and Platting Act entitled "REVIEW OF SUBDIVISION APPLICATION-REVIEW FOR REQUIRED ELEMENTS AND SUFFICIENCY OF INFORMATION" provides as follows:

> "(9) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter MAY OCCUR UNDER THE REGULATIONS IN EFFECT AT THE TIME A SUBDIVISION APPLICATION IS DETERMINED TO CONTAIN SUFFICIENT INFORMATION FOR REVIEW as provided in subsection (2). (b) IF REGULATIONS CHANGE DURING THE REVIEW PERIODS provided in subsections (1) and (2), the DETERMINATION OF WHETHER THE APPLICATION CONTAINS THE REQUIRED ELEMENTS AND SUFFICIENT INFORMATION MUST BE BASED ON THE NEW REGULATIONS. (emphasis added)

Montana Supreme Court case law appears to rule both ways with respect to revised regulations applicability to applications for permit approvals depending on the factual circumstances.

(1) Mogan v. City of Harlem, 739 P. 2d 491 (1987), Mogan was constructing a two-story eight (8) unit apartment building. Mogan applied for a water permit and a sanitary sewer permit, only one of each was required pursuant to the then existing ordinance. Mogan's permit applications were denied. The next day the City of Harlem amended its ordinance to require a separate independent permit for water and for sanitary sewer for each dwelling unit, rather than one per building. The Montana Supreme Court ruled that "as an applicant for permits, Mogan had a right to the provisions of the ordinance in effect at the time of his application."

(2) Town Pump v. Board of Adjustment City of Red Lodge, 971 P. 2d 349 (1998) Town Pump purchased land to build a gas station, convenience store and casino and planned to sell beer and wine for on premises consumption. A special exception was needed from the zoning board of adjustment, which was denied. There was litigation about the denial. Trial was delayed to allow the parties to work on resolving the legal issues themselves. During the 17th month of the delay, Red Lodge amended its development code to require a conditional use rather than a special exception permit for on premises consumption of

alcohol and made the development code retroactively applicable to land use changes received by the city of Red Lodge but not yet granted. The Montana Supreme Court ruled in favor of the City of Red Lodge with the legal caveat that "one notable exception to the general rule", "arises through equitable considerations" where "the applicant has substantially changed his position in reliance on the existing zoning or on the probability of a permit being issued." The Montana Supreme Court did not consider the exception to be applicable in the Town Pump case.

It appears that the only aspect of retroactivity that is certain is that the legislative enactment must state that it is retroactive. The outcome of any litigation cannot be guaranteed and is not certain.

CONCLUSION(S):

Subject to limited constitutional restrictions, a legislative proposal may have a retroactive applicability date that predates the date the legislative proposal is adapted. For example, a legislative body may specify that new legislative enactments apply to subdivision applications pending review. For example, see subsection 76-3-604(9), MCA of the Montana Subdivision and Platting Act.

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/s/
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