

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2009-012

**TO:** Roger Millar, OPG; Mike Barton, OPG; Laval Means, OPG; Jen Gress, OPG; Tom Zavitz, OPG; City/County Planning Board Members

**CC:** John Engen, Mayor; City Council; Bruce Bender, CAO; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Engineering; Pat Keiley, OPG; Dave Loomis, OPG; Jennie Dixon, OPG; Mary McCrea, OPG; Denise Alexander, OPG; Dept. Atty.

**FROM:** Jim Nugent

**DATE:** April 14, 2009

**RE:** City Council Adopted Ordinance Provisions Segregating Amendments to Zoning General Regulations and Amendments to Zoning Designations

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### FACTS:

Wednesday evening, April 8, 2009, OPG executive director Roger Millar distributed to City/County Planning Board members serving as the City Zoning Commission a copy of §§19.72.010 through 19.72.050 Missoula Municipal Code pertaining to the City Council ordinance adopted procedures for implementing zoning amendment reviews. There was some confusion concerning understanding the intended City Council differences between §19.72.010 "Amendments to General Regulations" and §19.72.020 "Amendments to Zoning Designations".

### ISSUE(S):

What are the Missoula City Council intended zoning process amendment differences between Missoula City Council adopted §19.72.010 MMC entitled "Amendments to General Regulations" and §19.72.020 MMC entitled "Amendments to Zoning Designations"?

### CONCLUSION(S):

Pursuant to the ordinance language utilized in §19.72.010 Missoula Municipal Code (MMC), the Missoula City Council identifies §19.72.010 MMC entitled "Amendment to General Regulations" as authorization for consideration "to amend, supplement, change, modify or repeal

the regulations and restrictions in the City of Missoula's zoning title. Pursuant to §19.72.020 MMC, the Missoula City Council identifies §19.72.020 MMC entitled "Amendments to Zoning Designations" as authorization to change the zoning designation of any zoning district or part thereof which is also referred to by the City Council within §19.72.020 MMC as "the boundary changes".

## LEGAL DISCUSSION:

Ziegler in "Rathkopf's The Law of Zoning and Planning in Volume 1, Section 2.11 entitled "Zoning Districts", notes the two significantly different aspects of zoning regulations when stating in pertinent part at page 2-28 that:

"However, as a legislative limitation on zoning, courts have pointed out that use district restrictions must be general and uniform and district classifications must be founded in real and not feigned differences related to the purposes for which the classes are formed." (Emphasis added.)

Ziegler in "Rathkopf's The Law of Zoning and Planning" in Volume 1, Section 2.12, entitled "Procedural Requirements" for enacting or amending zoning ordinances states in pertinent part at pages 2-29 and 2-30:

"...Generally the local legislative body is authorized by statutes to provide for the manner in which zoning regulations and restrictions and the boundaries of zoning districts ... shall be determined and established." (Emphasis added.)

Municipal zoning statute §76-2-301 MCA authorizes municipal zoning and expressly empowers a city council as legislative body to "regulate and restrict the height, number of stores and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and open spaces; the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes".

The next section of Montana Municipal Zoning statutory law is §76-2-302 MCA entitled "Zoning Districts". This provision provides in pertinent part that, "for the purposes of 76-2-301 MCA, entitled "Municipal Zoning Authorized" and partially quoted above, the city "council ... may divide the municipality into districts of the number, shape and area as are considered best suited to carry out the purposes of" municipal zoning. (Emphasis added.)

Thus, the Montana State Legislature has recognized that there are two important but somewhat differing aspects to municipal zoning: (1) enactment of general regulations and restrictions, and (2) enactment of zoning districts to carry out or implement zoning regulations by use of buildings, structures or land.

The Missoula City Council has recognized that there are two important but different aspects to municipal zoning when in Title 19, Chapter 19.72 entitled "Amendments" the Missoula City Council separately adopted Section 19.72.010 MMC entitled "Amendment to

General Regulations” and Section 19.72.020 MMC entitled “Amendments to Zoning Designations”.

Sections 19.72.010 and 19.72.020 MMC state as follows:

**19.72.10 Amendments to General Regulations.**

A. Consideration to amend, supplement, change, modify or repeal the regulations and restrictions in this title may be initiated by the City Council or by a petition requesting such change presented to the Council. Before taking any action upon any proposed amendment it shall be referred by the City Council to the Zoning Commission for review and recommendation. (Emphasis added.)

**19.72.20 Amendments to Zoning Designations.**

A. Consideration of changes in the zoning designation of any district or part thereof may be initiated by the City Council or by a petition requesting such change presented to the City Council, duly signed by the owners of thirty-five (35) percent or more, either of the area of the lots included within the change, or of the number of lots included within the change.

B. A requested zoning designation amendment shall be referred to the Zoning Commission which shall make a careful investigation and hold a public hearing before submitting its final recommendation to the City Council. Public notice of the request shall include:

1. Legal advertisement published twice in the official newspaper of the city stating the time and place set for the hearing upon the boundary changes. The first publication of such notice shall be made not less than fifteen days before the date of such hearing.
2. A conspicuous posting in at least one place on or near the property to be zoned, stating the time and place of the hearing. The property shall be posted a minimum of fifteen days prior to the hearing date.
3. Notification by first class mail of all owners of the property included in the zoning request and all owners of property within one hundred fifty (150) feet of the boundary of the property included in the zoning request.

(Emphasis added.)

Note that the Missoula City Council adopted language in §19.72.020 MMC utilizes “district” and “boundary”. Additional evidence that the city council considered the two sections 19.72.010 and 19.72.020 MMC to be addressing different aspects of zoning is also evident in subsection 19.72.030(A) MMC pertaining to both municipal zoning public hearings and municipal zoning protests where twice the Missoula City Council uses the phrase “proposed zoning designation amendment or general amendment.”

### **19.72.030 Decision and Protest**

A. At the public hearing for a proposed zoning designation amendment or general amendment, the City Council shall hear all persons and all objections and recommendations relative to the proposed change. Action shall be taken upon the request by the City Council, and the action shall be final and conclusive as to all matters and things involved in the change. If a valid protest is filed against a proposed zoning designation amendment or a general amendment, the Council's action shall be in conformance with state law provisions for a zoning protest.

B. Protest petitions must be filed with the City Clerk's office or on the public record prior to City Council action.

C. When such proposed amendment has been rejected by the City Council, any new application shall be accepted by the Planning Office for review. (Emphasis added.)

The very first part of §19.72.020 MMC entitled "Amendments to Zoning Designations" states "consideration of changes in the zoning designation of any district or part thereof." (Emphasis added.)

The Missoula City Council has defined "district" in §19.04.100 as meaning:

"19.04.100 District. A section of the city for which the regulations governing the area, height and use of buildings and premises are the same."

Further, pursuant to §19.02.020 MMC entitled "Districts generally" the Missoula City Council states that "for the purpose of regulating, classifying and restricting the location of trades, industries and enterprises, and the location of buildings designed, erected or altered for specified uses ... the city is hereby divided into districts." (Emphasis added.) Several dozen zoning classifications/districts are then identified in an ordinance listing of zoning districts.

The next city council adopted section, §19.02.030 MMC, commences with the sentence "The boundaries of the districts shall be defined as provided in the district boundary map." (Emphasis added.) Thus, the city council does make reference within the City of Missoula Zoning Regulations to zoning districts being "defined as provided in the district boundary map." Clearly, the Missoula City Council has in fact made reference to a zoning district map within its adopted zoning ordinances.

Rathkopf's "The Law of Zoning and Planning" Volume 1, Section 10.7 entitled "Determining Zoning District Boundaries" states in pertinent part at pages 10-11 and 10-12 as follows:

#### **§ 10:7 Determining zoning district boundaries**

In establishing such different zones and imposing restrictions on land, the legislative body should seek to determine the most appropriate use of the land in

the various parts of the municipality, taking into consideration the extent of development already existing. ... Property in zoned districts must be susceptible of use within the classification of permitted uses therein. ... (Emphasis added.)

Rathkopf's "The Law of Zoning and Planning" Volume 1, Section 10.18 entitled "Necessity of Clarity" states:

**§ 10:18 Necessity of clarity**

Zoning district boundaries established by the legislative body must be reasonably definite so that between the zoning map and the standards set forth in the ordinance the boundaries may be located and a landowner's rights ascertained. ... (Emphasis added.)

....

The universal rule in reviewing zoning ordinances is that to be valid the various districts must be described with reasonable certainty and have definite boundaries. ... (Emphasis added.)

See pages 10-26 and 10-28

Rathkopf's "The Law of Zoning and Planning", Volume 1, Section 10.19 at page 10-31, generally pertaining to selecting the location of zoning boundary lines states in pertinent part:

Since the function of districts and boundary lines is to separate uses which are to some degree inconsistent with each other, wherever the boundary lines between two districts is placed it may create difficulties, particularly where the two abutting districts are greatly different in character. ... (Emphasis added.)

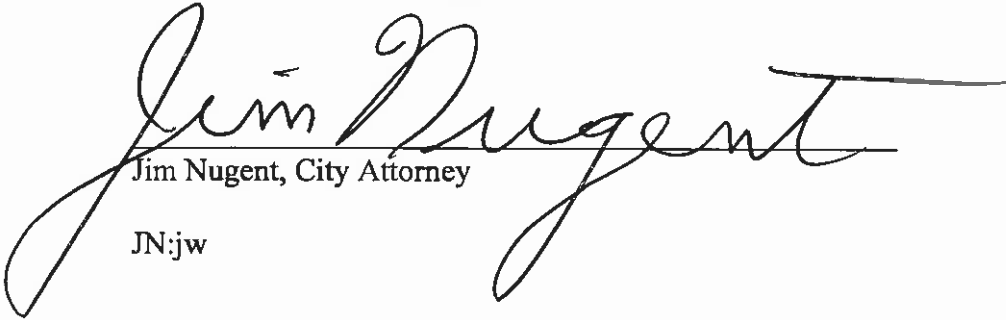
Obviously, it is generally accepted that there are two significant but differing aspects to zoning regulations. One aspect establishes and adopts the text of zoning regulations in a legislative format that is codified into a zoning regulation code and are often referred to as general regulations. The other aspect establishes zoning districts or zoning classifications and utilizes those zoning districts to apply zoning districts to areas of land that have defined boundaries wherein the land is subject to a specified zoning district zoning classification.

The Missoula City Council, being aware of these two significant, but differing aspects of municipal zoning, adopted §19.72.010 MMC to pertain to "Amendments to General Regulations" and adopted §19.72.020 MMC to pertain to "Amendments to Zoning Designations" pertaining to "changes in the zoning designation of any district." 10.72.020(A) MMC (Emphasis added.)

**CONCLUSION(S):**

Pursuant to the ordinance language utilized in §19.72.010 Missoula Municipal Code (MMC), the Missoula City Council identifies §19.72.010 MMC entitled "Amendment to General Regulations" as authorization for consideration "to amend, supplement, change, modify or repeal the regulations and restrictions in the City of Missoula's zoning title. Pursuant to §19.72.020 MMC, the Missoula City Council identifies §19.72.020 MMC entitled "Amendments to Zoning Designations" as authorization to change the zoning designation of any zoning district or part thereof which is also referred to by the City Council within §19.72.020 MMC as "the boundary changes".

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Jim Nugent, City Attorney

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