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VOLUME NO. 46

OPINION NO. 5

ANNEXATION - Authority of city council to adopt interim zoning regulations as to newly annexed lands;  
CITIES AND TOWNS - Obligation to comply with statutory protest provision when interim zoning ordinance modified operation of existing zoning ordinance;  
LAND USE - Obligation of city council to comply with statutory protest provision when interim zoning ordinance modified operation of existing zoning ordinance;  
MUNICIPAL GOVERNMENT - Obligation to comply with statutory protest provision when interim zoning ordinance modified operation of existing zoning ordinance;  
MONTANA CODE ANNOTATED - Sections 76-2-303 to -307, 76-2-310;  
MONTANA LAWS OF 1975 - Chapter 488, § 1;  
MONTANA LAWS OF 1929 - Chapter 136;  
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 68 (1986).

HELD: The protest provisions in Mont. Code Ann. § 76-2-305(2) are available to affected landowners whenever an existing zoning regulation is changed within the scope of Mont. Code Ann. § 76-2-305(1) through exercise by a city or town council of its interim zoning authority under Mont. Code Ann. § 76-2-306.

June 20, 1995

Mr. Jim Nugent  
Missoula City Attorney  
435 Ryman  
Missoula, MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning the proper application of Mont. Code Ann. § 76-2-306. After review of your request, I have determined that this opinion should be limited to resolving the relationship between that provision and Mont. Code Ann. § 76-2-305. I have therefore phrased the question you present as follows:

Under what circumstances, if any, do the protest provisions in Mont. Code Ann. § 76-2-305(2) apply to the

adoption of interim zoning ordinances under Mont. Code Ann. § 76-2-306?

I conclude that the two sections must be read in pari materia and that, when an interim zoning ordinance or regulation adopted in accordance with § 76-2-306 amends, supplements, changes, modifies or repeals an existing zoning ordinance, the provisions of § 76-2-305(2) must be complied with if an appropriate protest is filed.

The core of Montana's municipal zoning law was taken from the Standard State Zoning Enabling Act ["SSZEA"] and was adopted in 1929. 1929 Mont. Laws, ch. 136; see generally 4 Patrick J. Rohan, Zoning and Land Use Controls § 35.04[1] (1994) ["Rohan"]. Then and now, the Montana statute authorizes a city council to adopt and amend zoning regulations but, before doing so, requires not only that the municipality's zoning commission hold public hearings and issue a final report to the council but also that the council itself hold a public hearing as to which at least 15 days' notice is given. 1929 Mont. Laws, ch. 136, §§ 4-6 (codified as amended at Mont. Code Ann. §§ 76-2-303, -305, -307). Aside from these basic requirements, any change in a zoning regulation is subject to protest by affected landowners:

In case, however, of a protest against such change signed by the owners of 20% or more either of the area of the lots included in such proposed change or of those immediately adjacent in the rear thereof extended 150 feet therefrom or of those adjacent on either side within the same block or of those directly opposite thereof extending 150 feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the city or town council or legislative body of such municipality.

§ 76-2-305(2); see 41 Op. Att'y Gen. No. 68 at 283 (1986). Comments to the SSZEA indicated that the protest provision reflected "the practice . . . of permitting ordinary routine changes to be adopted by a majority vote of the local legislative body but requiring a three-fourths vote in the event of a protest from a substantial proportion of property owners whose interests are affected" and that such practice "tended to stabilize the ordinance." 8 Rohan, § 53.01[1] at 53-10.

Neither the SSZEA nor the Montana statute as originally enacted specifically addressed interim zoning--i.e., a temporary action which "either classifies or reclassifies land and imposes restrictions on uses allowed thereon in support of a contemplated pending zoning plan or zoning change." 1 Ziegler Rathkopf's The Law of Zoning and Planning § 11.01, at 11-3-4 (1994); see generally 1 Robert M. Anderson, American Law of Zoning 3d § 5.23 at 408-09 (1986) ("One to three years may be required to complete the

essential studies and evolve a comprehensive plan. . . . During this period of study and enactment, the development of the community continues. If the evolving land-use plan and its implementing regulations are made public, the period between public knowledge and final enactment may be used by some landowners and developers to construct buildings and establish uses which will disrupt the land-use plan"). The explanatory notes to the SSZEA discouraged the use of interim ordinances (8 Rohan § 53.01[1] at 53-55) and, while their adoption fell within the authority of legislative bodies, such authority arguably could be exercised only in compliance with the stringent procedural requirements imposed under the law with respect to the more general adoption or amendment of ordinances (3 Rohan § 22.02[3] at 22-25, -31).

The Montana legislature, however, established a special procedure for the adoption of interim zoning ordinances in 1975. 1975 Mont. Laws, ch. 488, § 1. That procedure is codified in § 76-2-306:

(1) The city or town council or other legislative body of such municipality, to protect the public safety, health, and welfare and without following the procedures otherwise required preliminary to the adoption of a zoning ordinance, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the legislative body is considering or studying or intends to study within a reasonable time.

(2) Such interim ordinance shall only be applicable within the city limits and up to 1 mile beyond the corporate boundaries of the city or town and shall take effect upon passage; provided, however, a hearing is first held upon notice reasonably designed to inform all affected parties and in no event shall notice be less than publication in a newspaper of general circulation at least 7 days before the hearing.

(3) Such interim ordinance shall be of no further force and effect 6 months from the date of adoption thereof. However, after notice pursuant to 76-2-303 and pursuant to public hearing, the legislative body may extend such interim ordinance for 1 year. Any such extension shall require a two-thirds vote for passage and shall become effective upon passage. Not more than two such extensions may be adopted.

Subsection (1) thus exempts an interim ordinance from "the procedures otherwise required preliminary to the adoption of a zoning ordinance" but, when read together with the remaining subsections, imposes various conditions on the use of that power: the existence of an exigency requiring prohibition of certain uses inconsistent with a zoning proposal under consideration; a public

hearing prior to the ordinance's adoption preceded by at least seven days' notice; a limitation on the geographical scope of the ordinance to one mile beyond municipal boundaries notwithstanding the provisions of Mont. Code Ann. § 76-2-310 which, for first- and second-class cities, allow municipal zoning provisions to extend, respectively, three and two miles beyond their boundaries; and a restriction on the ordinance's duration. Consistent with exception from "the procedures otherwise required preliminary to the adoption of a zoning ordinance," interim ordinances are excluded from the zoning commission hearing and report requirements imposed under § 76-2-307.

Your opinion request seeks determination of how the interim zoning provisions in § 76-2-306 apply in several general factual contexts. You ask first whether those provisions may be applied by a city council to prohibit a proposed use which is permitted under an existing ordinance. You next ask whether the provisions may be applied to permit a use prohibited under an existing ordinance. Lastly, you ask whether § 76-2-306 may be applied to newly annexed lands to which the city's zoning ordinance has not extended previously and, with respect to such lands, whether it is possible to tack interim zoning ordinances together for the purpose of exceeding the 2½-year limitation imposed under subsection (3).

The basic concern you express with respect to each hypothetical is application of § 76-2-306 in a manner which interferes with statutory protest rights under § 76-2-305(2). The phrase "procedures otherwise required preliminary to the adoption of a zoning ordinance," however, indicates your concern is unwarranted. That phrase, when construed most naturally, refers to the procedural requirements under §§ 76-2-303 and -307 and, conceivably, any additional procedures provided independently under the municipality's ordinances. This interpretation is particularly compelling in light of the express exception to the zoning commission hearing and report requirements in § 76-2-307 with respect to interim ordinances, an exception not made with respect to the supermajority vote needed to approve changes when a valid protest has been filed under § 76-2-305(2). See State ex rel. Diehl Co. v. State of Montana, 181 Mont. 306, 314, 593 P.2d 458, 462 (1979) (observing that "only in following [§ 76-2-306]" could a city commission "act on a moratorium without first referring the matter to the Zoning Commission" under § 76-2-307). Absent explicit statutory direction, I am unwilling to imply what is, in essence, the repeal of a landowner's protest rights whenever a change in an existing ordinance is made through use of the interim zoning ordinance procedure. E.g., Kuchan v. Harvey, 179 Mont. 7, 10, 585 P.2d 1298, 1300 (1978).

The issue therefore becomes whether, in the situations you have posed, a change within the scope of § 76-2-305 exists. The first two hypotheticals do involve such a change and, while the city council has authority to utilize the interim zoning ordinance

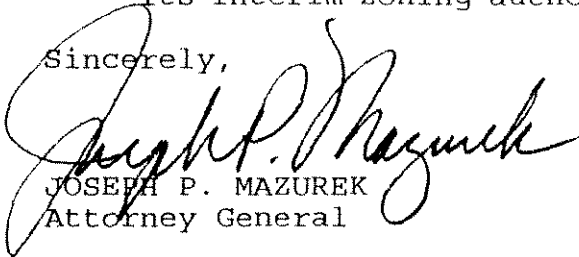
mechanism to effect the change temporarily, exercise of that authority is subject to the protest provisions in § 76-2-305(2). As to the third hypothetical, my understanding concerning the operation of Missoula's zoning ordinance is that recently annexed land remains unzoned until the council takes affirmative action to zone. Under those circumstances, § 76-2-305 has no application because no change in the ordinance itself is contemplated; the council instead merely exercises authority, otherwise conferred under the ordinance, to zone property as it deems appropriate.

Finally, whether the council can tack one interim zoning ordinance to another and thereby extend the duration of interim zoning beyond the period allowed under § 76-2-306(3) cannot be resolved conclusively on the basis of the facts you have supplied. By stating that no extensions other than the two provided under subsection (3) may be adopted, the statute itself counsels against any attempt to use a second ordinance as a subterfuge for continuing the interim zoning process beyond two and one-half years. Nevertheless, I am not prepared to hold that there are no circumstances under which consecutive interim ordinances would be proper.

THEREFORE, IT IS MY OPINION:

The protest provisions in Mont. Code Ann. § 76-2-305(2) are available to affected landowners whenever an existing zoning regulation is changed within the scope of Mont. Code Ann. § 76-2-305(1) through exercise by a city or town council of its interim zoning authority under Mont. Code Ann. § 76-2-306.

Sincerely,



JOSEPH P. MAZUREK  
Attorney General

jpm/crs/bjh