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Legal Opinion 2014-003

TO: Mayor John Engen, City Council, Bruce Bender, Ginny Merriam, Marty Rehbein, Nikki Rogers, Kelly Elam, Carl Horton, City Department Heads

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE January 24, 2014

RE: Montana Constitutional rights and statutory rights of public to both participate in operation of government and to observe the deliberations of public bodies at public meetings that shall be conducted openly, unless privacy clearly exceeds merits of public disclosure.

FACTS:

The issue of participation in city council meetings by city elected officials not physically present in attendance at the city council public meeting arose recently. Modern technology generates both legal and factual issues with respect to the public's constitutional and statutory rights to participate in as well as observe public body deliberations during open meetings of public bodies. There are numerous legal as well as factual aspects that must be weighed and considered to ensure any such modern technology participation of city council members at a city council meeting complies with Montana's Constitutional and statutory public rights to observe the deliberations of the city council.

ISSUE(S):

Pursuant to Montana Law what public rights must be considered as part of conducting meetings of public bodies such as a municipal city council meeting?

CONCLUSION(S):

Pursuant to Montana Constitutional and statutory law, the public has the right to expect that governmental public bodies, such as a municipal city council, provide the public with both a reasonable opportunity to participate in public meetings as well as the public right to "observe the deliberations of all public bodies" at public meetings that shall be conducted openly.

LEGAL DISCUSSION:

Pursuant to Article II, section 8 “RIGHT OF PARTICIPATION” and Article II, section 9 “RIGHT TO KNOW”, Montana’s Constitution provides a public right of participation in the operation of governmental agencies prior to final decisions being made as well as a right “to observe the deliberations of all public bodies”, except in cases in which the demand for individual privacy clearly exceeds the merits of public disclosure.

Montana Constitutional provision Article II, section 8 entitled “RIGHT OF PARTICIPATION” provides:

“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)

Montana Constitutional provision Article II, section 9 entitled “RIGHT TO KNOW” provides:

“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)

Thus, the Montana Constitution established a Montana Constitutional right for persons to “observe the deliberations” of the city council.

Title 2, chapter 3, part 2 Montana Code Annotated is entitled “OPEN MEETINGS”. The first section of that part, section 2-3-201 MCA is entitled “LEGISLATIVE INTENT-LIBERAL CONSTRUCTION”. Section 2-3-201 MCA provides:

“2-3-201. LEGISLATIVE INTENT-LIBERAL CONSTRUCTION”. The legislature finds and declares that PUBLIC boards, commissions, COUNCILS, and other PUBLIC AGENCIES in this state EXIST TO AID IN THE CONDUCT OF THE PEOPLES’ BUSINESS. IT IS THE INTENT OF THIS PART THAT ACTIONS AND DELIBERATIONS OF ALL PUBLIC AGENCIES SHALL BE CONDUCTED OPENLY. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. TOWARD THESE ENDS, THE PROVISIONS OF THE PART SHALL BE LIBERALLY CONSTRUED.” (emphasis added)

Section 2-3-201 MCA expressly requires that the actions and deliberations of all public agencies shall be conducted openly. Further, section 2-3-201 MCA provides that toward these statutory ends the provisions of title 2, chapter 3, part 2 shall be “liberally construed”.

With respect to the public’s constitutional right to observe the deliberations of public bodies at public open meetings, the Montana Supreme Court in *Associated Press v. Crofts*, 2004 MT 120,

321 M 193, 89 P 3d 971 (2004) indicated that policy meetings between the commissioner of higher education and senior employees were subject to Montana's open meeting laws. The Montana Supreme Court in that case also indicated that the Montana State Legislature created open meeting laws with the intent that deliberations of state agencies be conducted openly, and that to that end the open meeting laws are to be liberally construed. The Montana Supreme Court also indicated that the Montana Constitution protects the public's right to observe deliberations of public bodies and the policy committee meetings were required to be open to the public.

With respect to modern technology occurring since the 1972 adoption of the Montana Constitution, section 2-3-301 MCA addresses the use of electronic mail systems and provides that government agencies accepting public comment shall provide for the receipt of public comment by use of an electronic mail system.

The evolution of modern technology presents numerous potential challenges and difficulties for government elected officials and government bodies in Montana. While pursuant to section 7-5-4103 MCA the city council may determine the rules of its proceedings, any city council rules must comply with the public's Article II, sections 8 and 9 Montana Constitutional rights to "reasonable opportunity for citizen participation"; "observe deliberations of all public bodies" as well as pursuant to section 2-3-201 MCA ensure that both city council actions and deliberations pertaining to the people's business "shall be conducted openly". Further, as previously noted these public rights pursuant to Montana law are to be liberally construed in favor of the public rights established pursuant to Montana law.

Some provisions of the Montana Constitution and Montana state laws pertaining to public participation and open meetings may be subject to future court decisions and even more often the interpretation advocacy of persons desiring to participate in required public open meetings as well as observe the actions and deliberations of public bodies prior to final decisions being made. What might constitute "reasonable opportunity" of persons to participate in public meetings or the full extent of the public's right to observe deliberations of public bodies may be determined by Montana Courts.

A potential non-inclusive itemization of potential considerations that might occur with respect to city council members and/or a mayor not being physically present at a city council public meeting, yet the city elected official desiring to actively participate in city council decision making during public meetings, including public hearings likely could include the following potential concerns:

1. How does the physically absent city elected official receive and review photographs, maps, information materials physically distributed and/or presented from the podium during city council public hearings and/or public meetings when the decision is being made at that same public meeting? Could this factual circumstance make a close city council decision vote where the city council member(s) participating via technology votes with the majority or causes a tie vote that the mayor breaks, be vulnerable to legal challenge by someone opposing the outcome of the city council decision?

2. How does the absent city elected official learn who is in the city council audience and/or how many persons in the audience at the public meeting are there for a specific agenda item? How does the absent city elected official learn if people in the audience are wearing a button, shirt, hat, carries a sign, stands and/or raises their hand in support or opposition of the agenda item? How does the absent elected city official learn that many in the audience are disabled, young, old, female, male, etc.? If a city council member(s) participating via modern technology votes with the majority or causes a tie vote that the mayor breaks, does this factual circumstance make a close city council decision vote vulnerable to legal challenge by someone opposing the outcome of the city council decision?
3. How does the absent city elected official learn of the audience body language, moans, or sighs that may occur during the public hearing and/or public meeting?
4. How do public citizen persons observe whether the absent city elected official is being attentive to the city council public meeting?
5. How do public citizen persons observe the reactions and/or body language of the absent city elected official as part of their right to observe the “actions and deliberations” of the city council?
6. How does the public citizen person observe and/or learn who might be with and/or somehow influencing the physically absent city council member during the city council meeting?
7. If city elected officials not physically present at the city council meeting are allowed to participate via modern technology, will similar opportunity be afforded to the persons comprising the public citizenry? Would the courts potentially require such similar opportunity for persons who are members of the public citizenry?
8. Common legal definition of quorum of a body is the presence of a majority of the body’s membership; or the minimum number of persons that must be present in order for the body to conduct its business. Do those definitions of quorum currently and/or in the future mean a majority of the body being physically present at the city council meeting? The Mayor is a different branch of municipal government and does not count toward the presence of a quorum at the city council’s meetings.
9. If a majority of the city council were not physically present, would there be a lack of quorum or alternatively a quorum present for purposes of the public’s right to observe the deliberations of the city council if enough absent City Council members are participating via modern technology that arguably a quorum is present?

10. What if there are multiple city elected officials absent from being physically present at the meeting; but desiring to participate through modern technology?
11. How much more City owned modern technology infrastructure might be required to adequately address some of the above identified concerns?
12. Will any additional staff be needed at the city council meeting to adequately address the above identified concerns?
13. What if there are technological problems that make the technology inaudible and/or inoperable during a specific city council meeting? Is the city council meeting canceled? Is the city council meeting recessed? Is the city council meeting stopped and continued to another date certain? There was a city council meeting this past summer of 2013 that had technological problems that prevented the public from observing the city council via technology.
14. Will the presence of such modern technology mean that even more city elected officials will not be physically present for the city council meeting; because they could now opt to participate via modern technology without being physically present at the city council meeting?
15. Will the very existence and utilization of city elected officials participating via modern technology in and of itself serve as a source of some public citizen critique/opposition/legal challenge?
16. Etc., etc., etc.

Any city council efforts to incorporate absent city council member participation in city council meetings and city council decision making will have to adequately address concerns such as those identified herein to the satisfaction of Montana Courts that are ensuring public rights to public observance of city council deliberations as well as providing reasonable opportunity for public participation.

The above identification of potential legal or practical difficulties and/or challenges to affording city elected officials participation in city council, meetings and city council decision making during those city council meetings via modern technology is not an exhaustive identification of the potential concerns that could arise. The above identification is intended to be an identification of potential concerns as well as complexity of numerous legal and factual difficulties and challenges that could exist that the city council likely would have to consider and/or address.

CONCLUSION(S):

Pursuant to Montana Constitutional and statutory law, the public has the right to expect that governmental public bodies, such as a municipal city council, provide the public with both a

reasonable opportunity to participate in public meetings as well as the public right to “observe the deliberations of all public bodies” at public meetings that shall be conducted openly.

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/s/

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