From: Gersovitz, Jeremy (LEG)

Sent: Wednesday, July 15, 2009 2:21 PM

To: Bob Hawks; Cheryl Steenson; Elsie Arntzen; Edie McClafferty; Gary Branae; Jim Peterson; Kelly Gebhardt; Kim Gillan; Lake (Rep.), Bob; McGee, Dan (Senator); Russell Bean; Wanda Grinde

Subject: "Emergency" or interim zoning and private property rights

During the ELG meeting of June 30th I had been asked to provide background information on this issue.

The 5th Amendment to the U.S. Constitution (which applies to the states through the 14th Amendment) prohibits the taking of property without just compensation. Article II, Section 29, of Montana's Constitution enshrines similar protections: "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails." Article II, Section 17, sets out: "No person shall be deprived of life, liberty or property without due process of law."

Merely regulating the use of property, however, was not traditionally seen as entitling the owner to compensation. The police power, or the power of the state to place restraints on the personal freedom and property rights of persons in order to promote order, safety, health and morals, is considered an essential attribute of government. It is, however, not without constitutional limitation and most importantly is subject to requirements of due process. Land development ordinances have come under legal attack as violative of the 14th Amendment's due process and equal protection clauses. The argument advanced is that these ordinances deprive the owner of the most beneficial or profitable use of the land. Regulations have been upheld where they protect the community's health, safety or welfare, are not arbitrary, capricious or unreasonable and operate uniformly upon all similarly situated landowners. A taking seems to be judicially recognized where there is a total deprivation of reasonable economic use.

In McElwain v. The County of Flathead, 248 Mont. 231, decided May 2, 1991, the Montana Supreme Court synchronized its analysis of taking issues with that of the United States Supreme Court, stating expressly that: "the question to determine whether a land-use regulation is properly invoked is whether the regulation is substantially related to the legitimate state interest of protecting the health, safety, morals, or general welfare of the public, and utilizes the least restrictive means necessary to achieve this end without denying the owner economically viable use of his or her land." In the Montana Supreme Court's most recent pronouncement on this subject, Buhmann v. State, 2008 MT 465, decided December 31, 2008, (petition for cert. filed May 11, 2009), the Court reaffirmed that they will generally look to federal case law for guidance when considering takings claims brought under Article II, Section 29.

Montana statutes provide for interim zoning on both the county (Section 76-2-206, MCA) and municipal (Section 76-2-306, MCA) level. As you are no doubt aware, in the last session HB 486 generally revised land use laws to include amendments to Section 76-2-206, MCA. (I am

including below a link to this legislation). While for the most part the amendment to this section just incorporated the adoption procedure which was provided for in Section 72-2-205, MCA, and which had always been applicable to Section 72-2-206, the legislation added one important provision. The public notice must now set out: "the specific emergency or exigent circumstance compelling the establishment of the proposed interim zoning district or interim regulation". In Vol. 49, Op. No. 23, (2002) Attorney General McGrath opined that "both "emergency" and "urgency" measures exist if there is some exigent circumstance impacting the public health, safety and welfare, and zoning is required to address the exigency pursuant to Mont. Code Ann. Section 76-2-203(1) and -304(1). ... Thus, interim zoning may be adopted when a community has not adopted a growth policy so long as all proper procedures are followed, more formal planning processes are underway and the interim measure is reasonably related to an exigent circumstance as described in this opinion. The question of what constitutes an "exigency is largely fact-bound, and under the law it is left largely to the discretion of the local governing body. However, in my opinion, the failure to adopt a growth policy cannot, in and of itself, constitute an "exigency" that would allow adoption of emergency interim zoning ."

Montana code (Section 2-15-501(7), MCA) provides that “if an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion is controlling unless overruled by a state district court or the supreme court".

Please do not hesitate to contact me should you require further information.

Link to HB486:

http://data.opi.mt.gov/bills/2009/billhtml/HB0486.htm

Jeremy Gersovitz
Legislative Attorney
State Capitol Building, Room 125
P.O. Box 201706
Helena, MT 59620-1706
Office: 406-444-3804
FAX: 406-444-3036