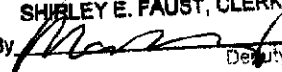


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FILED OCT 02 2009

SHIRLEY E. FAUST, CLERK
By  Deputy

**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

**RICHARD E. HAINES, LYN
HELLEGAARD, and RENEE G.
MITCHELL,**

Petitioners,

v.

CITY OF MISSOULA,

Respondent.

Dept. 3
Cause No. DV-2009-851

**ORDER ON PETITION FOR WRIT
OF MANDATE**

Before the Court is Petitioners Richard E. Haines, Lyn Hellegaard, and Renee G. Mitchell's request for an alternate writ of mandate which seeks to require the Missoula City Council to follow the notice and procedural requirements contained in Montana statutes and city regulations before voting on its proposed zoning changes on October 5, 2009. At that hearing, the Missoula City Council will be considering a general update to its zoning ordinances.

Oral argument was held on September 21, 2009, and for the foregoing reasons the request for a writ is denied.

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SUMMARY

1
2 To obtain a writ of mandate a party must prove: (1) the writ is necessary
3 to make the opposing party perform a clear legal duty; and, (2) the party seeking the
4 writ has no plain, speedy, and adequate remedy available in the ordinary course of the
5 law. Section 27-26-102, MCA. As will be discussed, the only clear statutory duty the
6 City is required to perform is to provide published notice in the *Missoulian* pursuant to
7 Section 76-2-303(2), MCA, which was accomplished on numerous occasions here.

8 After a full review of the record presented to the Court, it appears that
9 the City is thoroughly complying with statutory and city notice requirements in
10 amending the City's zoning ordinances. The City has already conducted dozens of
11 public meetings on the proposed changes, and the requisite public notice has been
12 provided. It appears that the criteria of Section 75-2-304, MCA (304 criteria), have
13 been considered in one way or another during the extremely thorough rewrite of the
14 zoning provisions. If specific property owners are damaged, they can assert a claim
15 against the City¹ after the zoning changes are implemented.

DISCUSSION

16
17 In general, a writ of mandamus will only be available to compel the
18 performance of ministerial acts. A writ of mandamus will not issue to control or
19 require a discretionary act. *Foster v. City of Bozeman*, 189 Mont. 64, 67, 614 P.2d
20 1072, 1074 (1990). A ministerial act is one that has no room for discretion and which
21 is required to be done in a prescribed manner without regard to personal judgment or
22 opinion as to the propriety or impropriety of the act to be performed. *Kadillak v.*
23 *Anaconda Co.*, 184 Mont. 127, 143, 602 P.2d 147, 156 (1979); *State ex rel. Browman*

24
25 ² The Court is unaware as to whether the City of Missoula's administrative
process would need to be exhausted prior to claims being brought in district court.

1 v. *Wood*, 168 Mont. 341, 345, 543 P.2d 184, 187 (1975); *State ex rel. Swart v. Casne*,
2 172 Mont. 302, 309, 564 P.2d 983, 987 (1977).

3 While the notice requirements are mandatory, application of the 304
4 criteria involves discretion.

5 **Notice Requirements**

6 The applicable statutes create a legal duty on the part of the City of
7 Missoula to provide at least fifteen days' notice of the time and place of the City
8 Council's meeting in which any proposed change or amendment of a zoning order is to
9 be voted upon. Sections 76-2-303(2), 305, MCA. Those requirements would be
10 considered ministerial acts where no room for discretion exists. City ordinance
11 Chapter 19.72.20 entitled "Amendments to Zoning Designations" allegedly also
12 requires publication of two notices — posting on or near the property to be zoned and
13 the sending of written notification to all impacted property owners and property
14 owners within 150 feet of the property to be zoned. That provision is attached to
15 Petitioners' Brief in Support of Application for Alternative Writ of Mandate as Exhibit
16 10 and appears to this Court to relate to individual zoning issues. In addition, City
17 ordinance Chapter 19.72.040 entitled "Evaluation of Zoning Requests" also appears to
18 relate to individual zoning issues as it states, "[w]hen considering an application for
19 amending zoning designations, the Planning Board and City Council shall be guided by
20 and adopt findings of fact based upon [twelve criteria]."

21 In contrast, MMC 19.72.10 appears to relate to the current overhaul of
22 the zoning ordinances. That provision simply states:

23 [c]onsideration to amend, supplement, change, modify or repeal the
24 regulations and restrictions in this title may be initiated by the City
25 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.

1 In the fall of 2007, the Missoula Office of Planning and Grants (OPG)
2 hired a planning consultant (Duncan Associates) to revise Missoula's current zoning
3 ordinance. On January 26, 2009, the Missoula City Council directed its staff to mail
4 notice to all property owners within the City of Missoula of the proposed revision to
5 the City's zoning ordinance, explaining future opportunities for public comment. (City
6 of Missoula's Reply Br. Sup. City's Mot. to Deny or in the Alternative Mot. To Quash
7 Writ of Mandate and Br. Supp. (hereafter City's Reply Br.), Ex. 1, at 3, ¶ 14.) Legal
8 notice of the Missoula Consolidated Planning Board (MCPB) was published in the
9 *Missoulian* on February 15 and 22, 2009. (Id., at 2, ¶¶ 8, 9.) On March 3, 2009, the
10 MCPB initiated its public hearing on the revised zoning ordinance. (Id., at 3, ¶ 10.)
11 The public hearing was continued through sixteen subsequent sessions, and notice of
12 each meeting was published in the *Missoulian*. (Id.) On May 19, 2009, the MCPB
13 recommended draft revisions to the City's zoning ordinance which were to be provided
14 to the Missoula City Council. (Id., at 3, ¶ 11.) On June 1, 2009, the City Council
15 scheduled a public hearing on June 22, 2009 to begin consideration of newly adopted
16 Title 20, which was to replace Title 19 of the City ordinances. Notice of the June 22
17 meeting was published in the *Missoulian* on June 7, 2009, in accordance with Section
18 76-2-303(2), MCA. (Id., at 3, ¶¶ 12, 13.)

19 In addition, the OPG staff involved with this issue has conducted more
20 than 80 public meetings with neighborhood groups, special interests, and the general
21 public to solicit comments. A website was maintained to inform the public of
22 developments related to the code revisions, and 16 newsletters were sent by email to
23 more than 500 parties who had expressed interest in the process. (Id., at 3, 4, ¶ 15.)

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1 In summary, the Missoula City Council and its joint City/Counry
2 Missoula Consolidated Board appear to have throughly complied with the applicable
3 notice provisions.

4 **Section 75-2-304 Criteria**

5 In addition to notice requirements, the Montana Supreme Court has ruled
6 that zoning decisions are invalid unless they are made in accordance with the
7 provisions of Section 75-2-304, MCA. *Schanz v. City of Billings*, 182 Mont. 328, 336,
8 597 P.2d 67, 71 (1979); see also *Lowe v. City of Missoula*, 165 Mont. 38, 525 P.2d 551
9 (1974). In *Lowe*, the Missoula City Council made zoning changes on Lowe's 5.8 acre
10 parcel in Missoula. The Montana Supreme Court stated that in such zoning cases the
11 criteria in the predecessor to Section 75-2-304, MCA, must be considered so a record
12 would be developed for judicial review. Defendant argues that the *Lowe* criteria do not
13 apply to general legislative changes to a zoning ordinance as opposed to individual
14 zoning.

15 The Court has received the affidavit of Roger Millar. Millar is the
16 director of the Office of Planning and Grants and, in that capacity, manages the City
17 Zoning Office. According to Millar,

18 The Missoula City Council zoning update rewrite is solely
19 considering legislative adoption of revised general zoning regulations. No
20 zoning or rezoning of land is being considered or occurring. No
21 overlay zoning district is being applied to any land. The application of
22 any zoning overlay district must be a subsequent proceeding specifically
23 focused on zoning of specified land, which is not what is currently
24 occurring.

25 (City's Reply Br., Ex. 2, at 11.)

The *Lowe* criteria are set forth in part in Section 76-2-304, MCA, which
states:

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1 **Criteria and guidelines for zoning regulations. (1) Zoning**
2 regulations must be:
3 (a) made in accordance with a growth policy; and
4 (b) designed to:
5 (i) secure safety from fire and other dangers;
6 (ii) promote public health, public safety, and the general welfare;
7 and
8 (iii) facilitate the adequate provision of transportation, water,
9 sewerage, schools, parks, and other public requirements.
10 (2) In the adoption of zoning regulations, the municipal governing
11 body shall consider:
12 (a) reasonable provision of adequate light and air;
13 (b) the effect on motorized and nonmotorized transportation
14 systems;
15 (c) promotion of compatible urban growth;
16 (d) the character of the district and its peculiar suitability for
17 particular uses; and
18 (e) conserving the value of buildings and encouraging the most
19 appropriate use of land throughout the jurisdictional area.

20 The City maintains that is it undertaking a general zoning rewrite that
21 does not affect rezoning of any particular parcel. Plaintiffs disagree with this
22 contention and assert that such rezoning is, in fact, occurring. At this stage of the
23 proceeding, with the evidence before this Court, it cannot be said with any degree of
24 clarity that rezoning of individual parcels is occurring. Again, as noted by Roger
25 Millar, there is no rezoning of land occurring as a result of this rewrite. Any actual
application of the zoning overlay currently being undertaken by the City will be
pursuant to a subsequent proceeding specifically focused on the zoning of specified
parcels of land. Plaintiffs have failed to persuade the Court that the City is actually
undertaking the rezoning of particular parcels. The Court feels that a writ of mandate
is inappropriate under these circumstances. If individual tracts of land are improperly
rezoned as a result of the City's proposed actions, then those individuals have the right
to seek redress in court.

Further, it is not entirely clear that the *Lowe* criteria and Section 76-2-
304, MCA, apply to zoning rewrites such as is currently occurring in Missoula. Be that

1 as it may, on June 22, 2009, the Missoula City Council held a public hearing to
2 consider the proposed revisions. The OPG staff report presented at that public hearing
3 is attached to the affidavit of Michael E. Barton. That executive summary contains an
4 analysis of the proposal measured against the 304 criteria. (City's Reply Br., Ex. 1
5 (Barton Aff.), Ex. A, at 4.) It cannot be said that the 304 criteria require a specific
6 outcome. Rather, the requirement, if it even applies in this case, requires that the
7 governing body consider the 304 criteria against the action under consideration. It
8 appears to this Court that this occurred in the June 22, 2009 City Council Meeting,
9 when the City Council was presented with Exhibit A to the Barton affidavit. As noted
10 above, there is not even clear authority for the proposition that the City has to consider
11 the 304 criteria in a general zoning rewrite. Even if the City is required to consider
12 those guideposts, it appears that the City considered them at the June 22, 2009 meeting.

13 In zoning cases, the applicable standard of review is whether the
14 information the City based its decision on is so lacking in fact and foundation, that it is
15 clearly unreasonable and is an abuse of discretion. *Lake County First v. Polson City*
16 *Council*, 2009 MT 322, ¶ 34, 2009 Mont. LEXIS 470. To be arbitrary and capricious,
17 the City's decisions must be "random, unreasonable, or seemingly unmotivated, based
18 on the existing record." *Id.* (other citations omitted).

19 Again, even assuming that the *Lowe* criteria apply to a general zoning
20 rewrite, the Montana Supreme Court has "not established a requirement that a
21 governing body explain in detail why it has determined each criterion is or is not met
22 and precisely what facts it found most convincing." *Lake County First*, ¶ 34. The
23 supreme court has approved a city council's consideration of an application, the report
24 of the zoning department, a board's recommendation, and public comment in
25 determining whether the *Lowe* criteria were met. *Id.* Clearly, this Court does not

1 know what is going happen with the Missoula City Council on October 5, 2009. Since
2 what the City Council is actually going to consider at that meeting is as of yet
3 unknown, there is no clear legal mandate that the City is ignoring. The zoning action
4 that the City Council is about to undertake is a legislative enactment and is presumed
5 to be valid and reasonable. *Id.*, ¶ 37. As noted by the supreme court, authority to make
6 zoning decisions is within the council's legislative powers, and courts are ill-equipped
7 to make them, thus entitling those decisions to the presumptions of validity and
8 reasonableness. *Id.*

9 The determination as to whether the decision of the governing body is
10 clearly unreasonable and constitutes an abuse of discretion is almost always decided
11 after the governing body has acted. *Id.* After the City Council does whatever it does
12 on October 5, 2009, affected property owners are certainly able to bring a suit and
13 contend that their individual property was improperly rezoned as a result of the general
14 zoning overwrite. That process will allow a court to consider the entire record before
15 the City Council and make a more specific factual determination as to whether a
16 particular property was actually rezoned and whether all of the material presented to
17 the City Council satisfied the *Lowe* criteria.

18 CONCLUSION

19 The Court concludes that there is no clear legal mandate being violated
20 by the Missoula City Council. Further, there are adequate legal remedies available to
21 any aggrieved citizens. Therefore, the request for an alternate writ of mandate is
22 DENIED.

23 DATED this 2 day of October 2009.

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JEFFREY M. SHERLOCK
District Court Judge

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pcs: The Clerk of Court is directed to mail conformed copies to counsel of record.

TJMS/haines v missoula ord writ mandate 4th jcd dist.wpd