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To: Mayor and City Council
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Kevin Iffland, Assistant City Administrator

From: Gina Dahl, Interim City Attorney 
Wyeth Friday, Planning and Community Services Director
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Date: December 2, 2020

Re: ReCode: Legal Review

Introduction

The City and Yellowstone County have been comprehensively revising their Zoning Code and maps and this process has been called Project ReCode. This was initiated by the City-County Planning Board on June 13, 2017. The purpose of the initiative was to update both the City and County Zoning Code. A Steering Committee assisted in drafting the code which consisted of a team of well-qualified professionals including consultant team lead, Elizabeth Garvin, a certified land use planner and attorney. A councilmember has posed the question of whether the entirety of the proposed code is compliant with the law. This memo will address that issue.

Discussion

Zoning Authority

Montana law authorizes Municipal zoning under MCA § 76-2-301. The updated City of Billings Zoning Code was drafted to comply with applicable Montana statutes (MCA 76-2-300 (Part 3 Zoning)) and both state and federal case law. The majority of the changes and edits made to the Zoning Code are either reflections of community goals and priorities expressed through the 2016 City of Billings Growth Policy or changes made to improve the functionality of the Zoning Code, to make it more clear and understandable, and to protect and preserve property values.

These content changes were made within the legal framework of the existing zoning code, which has been established law in Billings for many years. A few substantive and procedural changes that were made to reflect City Council preferences, such as restructuring casino and bar regulations, revising the City's approach to nonconformities, and clarifying the language of the special review process, were addressed with the input of the City Attorney.

The sign code revisions were made within our best understanding of the current applicability of the United State Supreme Court decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), which substantially affected how local government can regulate signage.

Changes and Corrections

Pursuant to section 27-1602, BMCC, staff may administratively make corrections to ensure the official adopted zoning map is consistent with the legislative actions of City Council concerning zone changes. This occurs only when a map error is found. A map error is when the legislative zoning history does not match the County GIS map.

To clarify, any changes made to the draft zoning map are not the same as corrections to the official adopted zoning map. Changes made to the draft zoning map before adoption by the City Council are similar to edits to a draft document before it is final and adopted by the governing body. There are no restrictions on staff making changes to the draft zoning map.

Effect of Zone Changes on Property

Every regulation of property impacts the property owner's freedom in some respect. But not every regulation can be deemed a "taking." Municipalities are authorized to zone and must be able to enact some regulations without having to pay everyone whose freedom may be affected or diminished.

A zoning code update can change the status of some properties in the community. This is generally acceptable under both Montana and federal law, and only rises to the level of a regulatory "taking" of property in extremely rare circumstances where a property owner has been deprived of *all* reasonable use of the property. The updated Zoning Code has been drafted with the goal of encouraging community growth and continued investment in properties and businesses located in Billings. Restrictions that exist in the current zoning code which have been recurring barriers to reinvestment have been changed to reflect both current and anticipated development types in the City. While there may be individual property owners who are concerned that adopting the new Zoning Code will impact their property value, there are multiple opportunities within the regulations to address those concerns, including special review, rezoning, and updated nonconformity regulations. If there are additional concerns about the application of specific regulations to individual properties, the property owner is encouraged to reach out to the Community Development Department to explore their options.

Conclusion

Project ReCode was drafted based on Montana statutes as well as federal and state case law. Any changes are within the legal structure of the current zoning code and are based on decades of case law and practice.