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March 27, 2020

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Re: Request for Opinion
Open public meetings during an emergency

Gentlemen:

On behalf of Custer County, the City of Bozeman and the Montana County Attorneys Association you have jointly requested an Opinion regarding an issue we have rephrased as follows:

During a declared state of emergency affecting the citizens and government of the State of Montana, may a public agency or local government conduct public meetings in whole or in part, after reasonable notice to the public, by means including electronic communication, video conferencing or other forms of remote participation?

Your request is made because of emergencies declared by both the State of Montana and the President of the United States to suppress the danger to the public posed by the novel coronavirus and resulting COVID-19.

On March 24, 2020, Governor Bullock issued a Directive authorizing local governments to modify the means by which they conduct the people's business, including modification of work hours, office access, building closures and work practices. That Directive specifically states:

Local governments are encouraged to find ways to provide for the right of public participation consistent with social distancing practices, including virtual participation where legal and practicable.

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MONTANA DEPARTMENT OF JUSTICE

Legal Services Division * Division of Criminal Investigation * Highway Patrol Division * Forensic Science Division
Gambling Control Division * Motor Vehicle Division * Information Technology Services Division * Central Services Division

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On March 26, 2020, Governor Bullock issued another Directive to “immediately implement measures to ensure social distancing to prevent the spread of disease.” The Governor declared:

I have determined that to protect public health and human safety, it is essential to the health, safety, and welfare of the State of Montana during the ongoing state of emergency that, to the maximum extent possible, individuals stay at home or at their place of residence.

Section I. 1. of the Directive specifically limits activity outside the home or place of residence “to the greatest extent possible, except as allowed in this Directive.” Further, the Directive states:

All **public** and private **gatherings** of any number of people occurring outside a household or living unit **are prohibited**, except for the limited purposes permitted by this Directive.

Governor’s Directive, March 26, 2020, Section 3 (emphasis added). The Governor’s Directive thereafter does not allow residents to leave their residences to attend government-centered meetings, conferences, workshops or any other type of public gathering related to the ongoing business of local government.

The March 26, 2020 Directive is effective from March 28 through April 10, 2020. If the “shelter” Directive is extended, your question regarding open meetings will present again. Based upon the research that you provided and our own, we offer the following advice.

Article II, Section 8 of the Montana Constitution provides:

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. The Legislature has codified guidelines to protect the Article II, Section 8, guarantees at § 2-3-101, et seq., MCA.

Article II, Section 9 of the Montana Constitution provides:

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.

As you referenced, these rights are also generally created statutorily pursuant to Mont. Code Ann. §§ 2-3-103, 2-3-111 and 2-3-201. The Legislature has also codified specific requirements for local governments with respect to public participation in government operations. (See §§ 7-1-4142 and 7-1-4143.) Under the Montana Constitution, the “right of participation” requires a “reasonable opportunity” and “right to know” carries the mandate of the opportunity to “observe.” Neither require actual physical presence.

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Each agency shall develop procedures for *permitting and encouraging the public to participate* in agency decisions that are of significant interest to the public. The procedures must *ensure adequate notice and assist public participation* before a final agency action is taken that is of significant interest to the public.

Mont. Code Ann. § 2-3-103(1)(a) (emphasis added). An agenda, notice, and an opportunity for public comment must be provided. *Id.*

In 47 Op. Att’y Gen. No. 13 (1998), Attorney General Mazurek recognized that under Montana’s open meeting and public participation laws, the public must be given “the opportunity to participate” in any decision of a local government, other than ministerial acts, if there is any question of whether the decision is of “significant public interest.” The Opinion notes statutory provisions regarding the public’s “right to observe the deliberation of all public bodies . . .” found in Title 2, Ch. 2, Part 2, Montana Code Annotated. 47 Op. Att’y Gen. No. 13 at 2. The intent of the statutes is to ensure that public agencies conduct all actions and deliberations openly. *Id.* Additionally, under Mont. Code Ann. § 7-5-2125, all meetings of a county commission “must be public.” *Id.* One may assume that this principle applies to town and city council meetings as well.

While that Opinion was concerned with the subjects triggering the requirement of holding open meetings, the intent of the statutory and constitutional requirements for open government are applicable here. Our previous analysis of cases and statutes revealed the intent that the public be provided the reasonable opportunity to participate and observe while the manner or mechanism is not defined.

The “right of participation” requires each public body to adopt policies which permit and encourage public participation in agency decisions. 47 Op. Att’y Gen. No. 13 at 3. The required procedures “must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to a final decision that is of significant interest to the public.” *Id.*, citing Mont. Code Ann. § 2-3-111(1). The Opinion notes that public participation may be waived when the agency decision concerns an emergency situation affecting the public health, welfare or safety (Mont. Code Ann. § 2-3-112(1)), but that involves the subject of the decision itself.

The authorities cited in 47 Op. Att’y Gen. No. 13 indicate that a reasonable opportunity for public observation and participation is required. The manner by which notice, participation and observation are provided to the public must be reasonable. *Id.* at 5.

Based on the above and the prior analysis by General Mazurek, the proposed “Guidelines for Conducting Local Public Meetings During COVID-19 Emergency” (revised March 27, 2020 through 1:00 p.m.; see Attachment) are reasonable and consistent with the intent of both the Montana Constitution and implementing statutes and the Governor’s Directives during this emergency.

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This letter is provided as a letter of advice to assist your resolution of the question presented as quickly as possible under these unprecedented events. It is not a formal Attorney General Opinion and should not be presented or cited as such.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. Fox', with a long horizontal line extending to the right.

TIM FOX
Attorney General

Enc.

Attachment to Letter of Advice, March 27, 2020

Proposed March 25, 2020 (revised by Montana League of Cities and Towns, through 1:00 p.m. March 27, 2020):

Guidelines for Conducting Local Public Meetings During COVID-19 Emergency

Montana local governments have a responsibility, duty, and power to secure and promote the public health and safety of those persons present in their respective jurisdictions as well as their public employee staffs and public officials from the COVID-19 pandemic disease. I recognize that different types and forms of Montana local government exist pursuant to Montana state law, and these different local governments have different statutory and local laws governing notice and conduct of public meetings. Therefore, each public agency should discuss the best protocol to follow with their respective local government attorney and executive staff before making any decision about when and how to proceed with a public meeting during the COVID-19 emergency pursuant to these guidelines.

1. **Cancel Non-Essential Meetings.** During this national and state COVID-19 emergency, and in light of *Executive Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures for the operation of local government* issued March 24, 2020, local governments should take all steps possible to indefinitely suspend all non-essential public meetings of any board, agency, or committee of the local government other than the governing body.
2. **Limit Public Meetings to Critical Items Only.** If a local government determines that a public meeting must be held, local governments should strive to limit the meeting to only those items necessitating immediate or timely action by the governing body. The local government may consider using a “consent agenda” or other methods for allowing for the quickest and most efficient meeting possible.
3. **Determine Type of Meeting.** In accordance with current public health and safety protocols and national or state directives, the local government should determine the best method for holding a public meeting while protecting public health and safety. During the COVID-19 emergency, a public meeting may be held through remote means.
4. **Noticing the Public Meeting.** The notice of any public meeting held during the COVID-19 emergency should also include information on the method by which the meeting will be held, including information about how the public may participate remotely and how documents to be discussed during the meeting can be accessed by the public.
5. **Meetings by Remote Communication.** If a meeting will be held in whole or in part through remote attendance and participation, the local government should strive, if possible, to provide a remote communication system that provides the members of the local governing body and the public the ability to see, hear, and reasonably participate in the meeting. If a local government does not have the technology or resources to provide video

conferencing, either temporarily or permanently, the local government must ensure, at a minimum:

- a. Each member of the governing body and the public in attendance must be able to adequately hear each other;
- b. Members of the public must be provided a reasonable opportunity to comment on both items on the agenda and on any matters not on the agenda, either through participation via the remote communication system or by other reasonable means;
- c. All members of the governing body and the public must be able to reasonably observe all materials reviewed and discussed by the governing body during the meeting. The local government may determine the best procedure for submitting materials to the governing body prior to or during the meeting, so long as the public can access the agenda and all related materials through one of the following methods:
 - i. On the local government's website;
 - ii. Through the video conferencing platform to be used for the meeting; or
 - iii. On an individual basis by email, mail, in-person, or other method described in the notice of the meeting.
- d. The local government must provide a method to take minutes of or record the meeting pursuant to the governing body's established rules for taking minutes.

These guidelines are recommendations as to how Montana local governments might implement temporary emergency measures for public meetings that provide reasonable opportunity for public participation prior to public body final decision making in light of the current emergency circumstances. The current COVID-19 pandemic necessitates a balancing of public participatory rights and more limited local government operations, including limited public meetings, that take into account current public health and safety protocols and national or state directives and recommended measures including social distancing and shelter in place orders. Acting in accordance with these guidelines will allow a reasonable opportunity for public participation and critical local government operations to continue while protecting the public health and safety of the public, local government employees, and local elected officials.