

VOLUME NO. 37

OPINION NO. 58

ZONING - Protest area; REVISED CODES OF MONTANA, 1947 -
Section 11-2705.

- HELD: 1. Section 11-2705, R.C.M. 1947, creates four separate protest areas. Protest by twenty percent of the owners of any area requires a 3/4 council vote;
2. To the extent that a rezoning proposal does not encompass more than one district, as in the case of changing the use classification of an entire district, twenty percent of the owners of all lots included in the proposed change must protest to trigger the 3/4 council voting requirement;
3. A single rezoning proposal which entails separable changes in separate districts must be considered as a series of proposals for the purpose of mapping the protest areas and determining the voting requirements.

August 25, 1977

Mae Nan Ellingson, Esq.
Assistant City Attorney
City of Missoula
Missoula, Montana 59801

Dear Ms. Ellingson:

You have requested my opinion on the following question:

In order to have a valid protest under section 11-2705, R.C.M. 1947, what is the area from which the 20% must be comprised?

Section 11-2705 as a rezoning provision, must be read in conjunction with the zoning statutes. Section 11-2702 establishes the district as the basic zoning unit. Section 11-2703 directs cities to provide the manner in which such districts are established, their boundaries determined, restrictions imposed, and amendments or changes effectuated. Section 11-2507 provides for such changes:

Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of twenty per centum (20%) or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending one hundred and fifty (150) feet therefrom, or of those adjacent on either side thereof within the same block, or of those directly opposite thereof extending one hundred and fifty (150) feet from the street frontage of such opposite lots, such amendment shall not become effective except by the favorable vote of three-fourths (3/4) of all the members of the city...council....

The Montana Supreme Court discussed, but did not define, the protest perimeter areas in Olson v. City Commission, 146 Mont. 386, 393-394, 407 P.2d 374 (1965). Many states have similar provisions and their interpretation has been the subject of litigation in a variety of contexts. The cases are compiled and discussed in Annot., 4 A.L.R.2d 335 (1949), 1 R. Anderson, American Law of Zoning, §§ 4.33 to 4.35 (2d ed. 1968), 1 A. Rathkopf, the Law of Zoning and Planning, §§ 28-1 to 28-11 (3d ed. 1974), 1 N. Williams, American Land Planning Law, § 16.23 (1974), and 1 E. Yokley, Zoning Law and Practice, §§ 7-12 (3d ed. 1965).

Because the statutes differ and their application depends to a large extent on the particular facts of the rezoning action, few general rules can be categorically enunciated. Annot; 4 A.L.R.2d at 338.

The statute creates four separate protest areas, E. Basseth, Zoning, 38 (1936). Area of lots and percentages must be calculated for each of the following protest areas:

- (a) the area of the lots included in the proposed change;
- (b) the area of the lots immediately adjacent in the rear of the lots included in the proposed change extending 150 feet from those lots;
- (c) the area of the lots adjacent on either side of the lots included in the proposed change within the same block;
- (d) the area of the lots directly opposite the area of the blocks included in the proposed change extending 150 feet from the street frontage of such opposite lots.

If a proposed change encompasses several blocks, for instance, changing the use classification of an entire district, 20% of the owners of all lots included in the change must protest. The words, "the area of lots included in [the] proposed change," are unambiguous, and the plain meaning of the language of a statute is used in construing its meaning. State ex rel. Woodahl v. District Court, 162 Mont. 283, 292, 511 P.2d 318, 323 (1973). Similar provisions have been so interpreted. See Morrell Realty Corp. v. Rayon Holding Corp., 240 N.Y.S. 38, 135 Misc. 845, aff'd 241 N.Y.S. 918, 229 App.Div. 760, aff'd 254 N.Y. 268, 172 N.E. 494, 499 (1930); Rusnak v. Township of Woodbridge, 69 N.J. Super. 309, 174 A.2d 276, 280 (1961).

You indicated that Missoula has permitted 20% of the owners of a single block which is a part of such redistricting to require a 3/4 vote just as to that block.

A redistricting proposal, while it affects several blocks, is but one proposal, and the "proposal" determines the relevant protest areas. See section 11-2705. Therefore to the extent that a single block is a part of a proposal affecting many blocks, the 3/4 voting requirement is triggered only when 20% of the owners of all of the blocks enter a valid protest.

It has been held that there are limitations on the breadth of acceptable proposals for the purpose of determining protest areas. Rusnak, 174 A.2d at 279. This is directed to your concern that if the language "area of lots included in such proposed change," is always read literally, it would permit rezoning of areas so large and unrelated that a citizen's right of protest would effectively be cut off.

The existence of the limitation and its scope derive from two considerations. The first involves dual policies. Section 11-2705 evinces a policy to protect the property owners most immediately affected by rezoning from unwarranted proposals. 1 A. Rathkopf at 285. A parallel policy dictates that the city council not be unduly restricted in redistricting broad areas in order to effectuate a comprehensive zoning system in conformity with changing municipal needs. See Morrell Realty Corp., 172 N.E. at 499.

The second consideration is statutory. Section 11-2702 creates districts as the basic zoning units. The interpretation of related zoning statutes must be consistent with this fundamental concept. See State ex rel. Jones v. Giles, 168 Mont. 130, 134, 541 P.2d 355, 358 (1975).

The court in Rusnak addressed these interrelated concerns. A proposed comprehensive ordinance would have affected many lots of that township. In determining the quantum of property necessary for an effective protest under a statute similar to section 11-2705, the court adopted the following rule:

[I]n computing the protest area the measure is not the land throughout an entire city or township but the area affected by any separable change. Not only must the areas affected by separable, but also the changes brought by the amendment must not be inseparably related to each other. They must be able to be considered separate sections separately enacted. Property not affected by a separable change should be excluded from the computation for there would be no reason for such owners to object.

Rusnak, 174 A.2d at 279.

The entire district rezoned to a different use classification was deemed the measure of protest. Id.

You present a fact situation wherein contiguous portions of commercial and B-residential districts were proposed to be rezoned to RII. Applying the rule of separable change enunciated above, separate protest areas would be determined for the commercial portion and the B residential portion. For purposes of determining protest areas and voting requirements, the council should consider the rezoning measure as entailing two separate proposals.

THEREFORE, IT IS MY OPINION:

1. Section 11-2705 creates four separate protest areas. Protest by twenty percent of the owners of any area requires a 3/4 council vote;
2. To the extent that a rezoning proposal does not encompass more than one district, as in the case of changing the use classification of an entire district, twenty percent of the owners of all lots included in the proposed change must protest to trigger the 3/4 council voting requirement;
3. A single rezoning proposal which entails separable changes in separate districts must be considered as a series of proposals for the purpose of mapping the protest areas and determining the voting requirements.

Very truly yours,

MIKE GREELY
Attorney General