

Chuck Stearns

From: John M. Phelps [jphelps@cityofwhitefish.org]
Sent: Tuesday, January 12, 2010 11:54 AM
To: Jenson Mike; Hyatt Chris (City); Askew Turner; Kahle Bill (City); Friel Ryan; Muhlfeld John (City); Mitchell Phil (City)
Cc: *Stearns Chuck; *Taylor David; Rich Knapp
Subject: Representation in the Doughnut

Dear All:

I was asked to describe different possible scenarios for creating some greater representation on planning and zoning issues for people in the doughnut. I will do my best to describe some possibilities, but bear in mind that state law doesn't necessarily support many of these ideas. Before going into what might be possible, I think it's important to understand what current state law provides.

Some may have the impression that having a zoning "doughnut" extending outside of a city's boundaries is a uniquely Whitefish idea, that was created without benefit of the Legislature or the Governor. But that is not the case. In 1971, the Legislature adopted an amendment to state land use laws that allowed cities to extend their zoning and subdivision jurisdiction outside of their boundaries. Third Class cities (less than 5,000 population) were allowed to extend their "doughnut" one mile outside their boundaries. Second Class cities, (5,000 to 10,000 population) could go two miles outside their boundaries, and First Class cities (10,000 or more) could go a full three miles outside their boundaries. The purpose of the new law was to recognize that cities are constantly growing, and that they will eventually grow into, and annex, those lands that encircle them. It made sense to -20- the 1971 Legislature (and presumably every Legislature since then) to allow cities to have a strong voice in the planning and development of the lands that would, in the foreseeable future, become part of the city. Allowing a city of only 10,000 people to extend its zoning a full three miles outside its boundaries highlights just how important the Legislature thought this was.

The 1971 Legislature (and every Legislature since) was no doubt aware that state law does not allow doughnut residents to vote to elect any of the city councilors that might decide planning and zoning issues in the doughnut. The Legislature was satisfied with that result. The Legislature could have made doughnut residents full-fledged voters of the city, although it would have been revolutionary to do so. Planning and zoning issues affecting the doughnut represent only a small fraction of the issues that city councilors vote on, and perhaps the only ones that have significant extra-territorial effect. Most decisions that city councilors weigh in on have nothing to do with doughnut residents. Allowing doughnut residents to elect city councilors would give them a voice in city government equal to city residents, allowing them to influence many issues (city taxes, city budgeting, city council priorities) that affect only city residents. A small city with a densely-populated doughnut could be controlled by voters in the doughnut. Had the Legislature given doughnut residents that level of control, city residents could complain that their city was being controlled by doughnut residents that pay no city taxes, and that don't have to deal with the consequences of their vote. Many states allow cities some control (zoning or otherwise) over the lands surrounding their borders, but I'm not aware of any state that gives the doughnut residents full voting rights to elect city councilors.

The 1971 Legislature did give doughnut residents a level of representation on zoning decisions in the doughnut. The same 1971 amendments that allowed cities to impose zoning in the doughnut required that cities doing so must add two doughnut residents, appointed by the County Commissioners, to the existing "city planning board." That was all that the Legislature felt was

necessary to insure that the doughnut residents had some level of representation. Final zoning decisions would be made by the city council.

The 1971 framework has undergone a slight change over the years. Now if there is to be a zoning doughnut around a city, the city and county have the option of forming a city-county planning board, as Whitefish and Flathead County did many years ago. By law, a city-county planning board must have nine members, four appointed by the Commissioners, four appointed by the City, and the ninth appointed by the local conservation district. Of course, the city-county planning board can only make recommendations. But the Legislature recognized that final zoning decisions can only be made by the City Council or the County Commissioners. If there is to be a zoning doughnut around a City, the Legislature determined that the City Council was the appropriate body to make those final decisions.

The 1971 law allowing zoning doughnuts around cities has never been challenged in a reported court case. The framework that the Legislature came up with is presumptively valid. Even in our current lawsuit over the 2005 Interlocal Agreement, neither the County nor the property owners that intervened in the lawsuit have challenged the 1971 law.

The Council asked for a discussion of possible ways to provide a greater voice in planning and zoning decisions for the residents of the doughnut. There are at least two general types of options: (1) those that require the Legislature to change the law, and (2) those that might be done without a change in the law. Persuading the Legislature to change a law is never easy, and a significant change is usually possible only if there is widespread support among cities and counties. I'm not aware of widespread discontent with the current doughnut law. What we are experiencing appears to be a unique Flathead County issue. But assuming that the Legislature is open to changing the law, the following are some ideas that could be considered:

1. The Legislature could allow residents of the doughnut to vote in all City Council elections. As indicated above, that would give doughnut residents a voice in issues beyond zoning, and could transfer control of a city from city residents to the doughnut residents.
2. The Legislature could provide that Cities with zoning doughnuts must add additional positions to their City Council, and allow doughnut residents alone to fill those council positions, by electing residents of the doughnut. In effect, the council would be expanded, and the new members would be from the doughnut. The new council members could be limited to voting only on zoning issues affecting the doughnut, or they could be allowed to vote on all municipal issues.
3. The Legislature could expand the rights of initiative and referendum to the residents of the doughnut, so that they could force an election on an unpopular zoning ordinance, or propose their own zoning ordinance.
4. The Legislature could create a new type of jurisdiction, that would be larger than a city's geographical jurisdiction, and that would allow everyone within its boundaries to vote to elect the governing representatives. Alternatively, certain issues would have to be submitted to all of the voters of the new jurisdiction.
5. The Legislature could liberalize the state annexation laws, so that cities could annex populated territories that surround them. That would bring the doughnut residents completely into the City, with full voting power and full participation. Current annexation laws are very restrictive for cities. Without consent from the property owners, Cities can only annex neighborhoods that are on city utilities, or that are surrounded by the city.

-21-

6. The Legislature could change the power of City-County Planning Boards, to make their decisions binding in some, or all situations. But that would take the final decision-making power out of the hands of both the city council and the commissioners, and put it in the hands of an unelected body.

There is probably an unlimited number of alternatives if the Legislature is going to weigh in. The following are some ideas that might be possibly for the City to do by itself, or with the cooperation of the County Commissioners.

1. The City Council could formally invite the four doughnut members of the City-County Planning Board to attend every Council meeting where zoning issues affecting the doughnut will be discussed. The doughnut members could be asked to make a special presentation on how the proposal would affect the doughnut, and provide feedback on how residents of the doughnut view the proposal.

2. The Council could require that any zoning proposal affecting the doughnut would require special notice to residents of the doughnut, to better insure that they are aware of the proposal. Notice could be mailed to all doughnut residents if a proposal would affect all of them, or to those living within a large radius of a proposal that would affect only a certain area within the doughnut.

3. The Council could commission a formal opinion survey, administered by a neutral party, to gauge attitudes within the doughnut before proceeding with a controversial proposal.

-22- 4. It would require a charter amendment, and probably require a favorable Attorney General opinion, but the City might be able to add several positions to the City Council, to be filled by election from residents of the doughnut, that would be allowed to vote, along with regular council members, on zoning issues that would affect the doughnut. A charter amendment would take a favorable vote of the city residents, which couldn't be assured. It might be possible to obtain an Attorney General opinion before asking the voters to amend the charter. But it generally takes 6-9 months to obtain an attorney general opinion. State law is not clear as to whether a charter city can go this far.

5. State law provides that cities and counties can delegate and transfer powers and responsibilities between themselves, and create unique new governing bodies for special purposes, by using interlocal agreements. If there were a will, and if the County had honored its past interlocal agreements, there is probably an unlimited variety of solutions that might be worked out between the city and the county. But the 2005 Interlocal Agreement, which was (1) carefully negotiated over a long period of time, which (2) represented a compromise by both the county and the city, and which (3) was approved by both bodies after great publicity and many public hearings, was rescinded by the county commissioners after only 3 years. The 2005 Interlocal Agreement provided that neither party could unilaterally rescind it. Solving this current impasse by entering into another interlocal agreement, which the current commissioners or another group of commissioners (one is elected every two years) can also rescind, is not a promising alternative. In the current lawsuit the County has taken the position that it can't share or transfer certain powers, even though State law allows it to, and even though it has agreed to do so in an Interlocal Agreement. It has also taken the position that when it enters into an Interlocal Agreement, it can do so only for a short term of years, which would prevent any lasting resolution. The Council may choose to pursue this possibility, but until the courts have confirmed that interlocal agreements are binding on the county, it seems to be a futile effort. I wish I could be more positive about this alternative, but I lived through several rocky years with the County, after which the parties entered into the 2005 Interlocal Agreement, to solve all of their disagreements, only to see the Commissioners rescind the settlement that they entered into.

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This is intended to be an introduction into some of the possibilities that are available. I hope that it will stimulate discussion. I can be more helpful when the Council has indicated which direction looks most promising. I would be happy to provide more information, or answer any questions that you might have. John

John Phelps, City Attorney
City of Whitefish
PO Box 158
Whitefish, MT 59937-0158
863-2444
863-1249 (Fax)
jphelps@cityofwhitefish.org

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**CITY COUNCIL SPECIAL SESSION
CITY COUNCIL CHAMBER CONFERENCE ROOM
TUESDAY, JANUARY 19, 2010, 5:00 TO 5:30 P.M.**

1. **CALL TO ORDER**
 2. **EXECUTIVE SESSION:** City Attorney Quarterly Litigation Update and Strategies to Follow with Respect to Litigation pursuant to §2-3-203(4)(a) MCA
 3. **ADJOURNMENT**
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**CITY COUNCIL WORK SESSION
CITY COUNCIL CHAMBER CONFERENCE ROOM
TUESDAY, JANUARY 19, 2010, 5:30 TO 7:00 P.M.**

1. Discuss process for hiring new City Attorney
- ✂ 2. Discuss options for addressing governance in the doughnut area
3. Adjournment